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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 ARISTA RECORDS, LLC. *et al.*,

4 Plaintiffs,

5 v.

06 Civ. 5936 (KMW)

6 LIME WIRE, LLC, *et al.*,

7 Defendants.

8 -----x

9 May 2, 2011

11:30 a.m.

10 Before:

11 HON. KIMBA M. WOOD,

12 District Judge

13 APPEARANCES

14 MUNGER, TOLLES & OLSON, LLP  
Attorneys for Plaintiffs

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1 (Case called)

2 THE DEPUTY CLERK: Starting with the plaintiff, can I  
3 have all counsel state their appearance for the record, please.

4 MR. POMERANTZ: Good morning, your Honor. Glenn  
5 Pomerantz on behalf of the plaintiffs, and with me are my  
6 colleagues Hailyn Chen, Melinda LeMoine and Kelly Klaus.

7 MR. BAIO: Your Honor, Joseph Baio on behalf of  
8 defendants; next to me is Mark Gorton and my co-counsel are  
9 Tariq Mundiya, John Oller, Todd Cosenza and Mary Eaton.

10 THE COURT: Good morning.

11 MR. BAIO: Good morning.

12 THE COURT: I have learned from the talk I just had  
13 with the jury administrator that there is one other civil trial  
14 on tomorrow and that we have a number of options as to how to  
15 handle our 60 jurors. They could fill out the form and go home  
16 and be told to call in a certain time of day and be told when  
17 to come back, or we can just tell them tonight to call in  
18 tomorrow and they'll be told when to come in.

19 So, our options are almost limitless with the jury.

20 I would like to move to the jury questionnaire. Have  
21 you had a chance to look at the names under no. 30 listed in  
22 bold? Those are the names that we propose to delete because  
23 they would elicit too much irrelevant information.

24 MR. POMERANTZ: Your Honor, I am not sure if in our  
25 view they all fit into that category. Some we are comfortable

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1 with and others we would like to discuss with your Honor.

2 THE COURT: Fine.

3 MR. POMERANTZ: I don't believe we have any concerns  
4 about Apple. We understand, that's fine with us. The banks  
5 that are on here, my understanding is that the banks are on the  
6 witness list of the defendants. I'm not sure if I remember  
7 why.

8 THE COURT: All right. What will the most important  
9 banker testify to?

10 MR. MUNDIYA: Your Honor, we don't plan to be calling  
11 bankers to talk about substance. It is really a document  
12 custodian issue and we have reached out to the banks to see if  
13 they will stipulate as to the authenticity of those documents.

14 THE COURT: Okay.

15 MR. MUNDIYA: So, it is likely that maybe there will  
16 be no bankers testifying.

17 THE COURT: Even if there are bankers testifying, that  
18 is document custodians, it matters not at all if a juror has  
19 heard the name. It is just not worth the time. I think you  
20 can all agree on that.

21 MR. POMERANTZ: We agree.

22 THE COURT: So, we will take the banks out.

23 MR. MUNDIYA: Yes.

24 MR. POMERANTZ: So, that then leaves services like  
25 BearShare, Grokster, iMesh, Kazaa, Morpheous, Napster.

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1 THE COURT: Google.

2 MR. POMERANTZ: Although Google is going to be a  
3 witness in this case, if your Honor recalls, because of the key  
4 word searches, so there will very well -- there is likely to be  
5 a witness from Google testifying in this case.

6 THE COURT: But I don't think you want to know  
7 everything every juror knows about Google. I don't think we  
8 need that at all.

9 MR. POMERANTZ: Right. Okay.

10 The questions about BearShare and the others, and I  
11 think Google probably, I think eMusic and Rhapsody, the  
12 legitimate services all fit into that same category, your  
13 Honor, and the questionnaire will pick up some of that in other  
14 places. I think what is picked up in question 30 with respect  
15 to services like BearShare and Kazaa and Grokster that I don't  
16 think is picked up elsewhere is suppose they knew somebody --  
17 they never used the service but they knew somebody who worked  
18 there or was affiliated with it and had some connection.

19 THE COURT: That's an okay question but the question  
20 being posed is not what you just said.

21 MR. POMERANTZ: Right. The question no. 30 is a  
22 little broader than that and we do pick up their usage or their  
23 family member's usage of those services elsewhere.

24 THE COURT: Earlier you do.

25 MR. POMERANTZ: Earlier.

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1 THE COURT: Right.

2 MR. POMERANTZ: So, it seems to me what is not picked  
3 up elsewhere, unless I am forgetting a question, is what if  
4 they know somebody who has worked at or who has some connection  
5 to one of these services but they, themselves, or their family  
6 members have not used it. We haven't picked that up, I don't  
7 think in other places in the questionnaire, and maybe that  
8 merits a different question.

9 THE COURT: Well, do you want to add to the list of  
10 entities they have used the additional companies?

11 MR. POMERANTZ: I think most of them are there. Hold  
12 on a second, your Honor.

13 THE COURT: I'm looking at question 22.

14 MR. POMERANTZ: Right. The answer is yes, your Honor.  
15 BearShare, for example, is one that is not listed there that  
16 probably should be added. I believe all the others are --

17 THE COURT: EMusic.

18 MR. POMERANTZ: That's, I believe -- that has always  
19 been a legitimate site and that should be off, I think, under  
20 the way we are doing it.

21 THE COURT: Okay.

22 MR. POMERANTZ: I think the only one is BearShare that  
23 needs to be added, 22. And then the question is, is there some  
24 way to pick up whether they know anybody who has worked at or  
25 has some affiliation with these as opposed to whether they

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1 themselves or a family member have downloaded through these  
2 services?

3 THE COURT: All right.

4 So, we could have -- 22 could have a first question  
5 which would be 22A, 22B would be the next paragraph, and then  
6 we would add a new 22C which would say: Do you know anyone who  
7 works at any of the following companies?

8 MR. POMERANTZ: Has worked. Right.

9 THE COURT: Anyone who works or who has worked.

10 And then after that I think you would have a line and  
11 you would say which one or ones.

12 MR. POMERANTZ: Your Honor, a couple other minor  
13 points.

14 THE COURT: Sure.

15 MR. POMERANTZ: On no. 30, about a third of the way  
16 down the list on page 6 there is an entry for Edgar Bronfman  
17 and right below that is Edgar Bronfman, Jr. That is the same  
18 person, he is junior. Either one is fine but there is only one  
19 Edgar Bronfman.

20 THE COURT: I will keep the junior.

21 MR. POMERANTZ: On the next page I don't know if your  
22 Honor wants to make a change, but for NPD there is something  
23 that says NPD and NPD Group, that's the same entity as well.

24 THE COURT: So, I will strike NPD.

25 MR. MUNDIYA: MGJ seems to be transposed, your Honor.

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1 I think it is MJG Lime Wire Family Limited Partnership. I  
2 think the Js and Gs are transposed.

3 THE COURT: What page are you on?

4 MR. MUNDIYA: Sorry. That's question 28 on page 5.

5 THE COURT: We will make that change.

6 Anything else on the jury questionnaire?

7 Just a reminder, the jury pool will get the  
8 questionnaires, they will get them either in this courtroom or  
9 if we decide it is more efficacious as a group, I mean counsel  
10 decide with me, it can be done in the jury administration room.  
11 They'll be filling it out in pen so that we can Xerox it -- do  
12 you wish to be heard?

13 MR. POMERANTZ: I just wanted to ask a question, your  
14 Honor.

15 THE COURT: Yes.

16 MR. POMERANTZ: Your Honor has a preliminary  
17 instruction --

18 THE COURT: Right.

19 MR. POMERANTZ: -- that your Honor wants to say to  
20 them before they answer this and I don't know if that can be  
21 done in the jury administration room or whether it --

22 THE COURT: I usually do it up here. If you want me  
23 to give them that instruction first, I can.

24 MR. POMERANTZ: I think it is --

25 THE COURT: These are alternative ways of doing it.

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1 MR. POMERANTZ: I think it is critical because the  
2 whole point of that instruction is to encourage them to answer  
3 this questionnaire honestly.

4 THE COURT: Okay.

5 MR. POMERANTZ: So, I think it is critical that that  
6 instruction be given before they answer the question.

7 THE COURT: I can do that. I can do that.

8 Once they fill it out we are going to take back their  
9 copies and Xerox them for you to look at. You can then look at  
10 them for about 20 minutes to half an hour and then we will move  
11 on to the voir dire. We can go into the robing room and we  
12 probably should, right after you've had a chance to look them  
13 all over so that we can see if we want to have any particular  
14 ground rules for challenges for cause.

15 With respect to the net worth opinion that I have  
16 issued, you will recall that because of plaintiff's later  
17 post-briefing argument that the net worth material,  
18 specifically the transfers and value of transfers that Mark  
19 Gorton made to multiple family limited partnerships, is  
20 relevant to the deterrence factor in calculating statutory  
21 damages under Bryant. I now find that net worth material is  
22 relevant not only to the two issues noted in the April 21, 2011  
23 order, punitive damages and plaintiff's fraudulent concealment  
24 claim, but also to statutory damages. I note, however, that I  
25 have not yet ruled on whether Mark Gorton's IRA is relevant to



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1 statutory damages and I will rule on that later.

2 Could counsel clarify for me what plaintiffs would  
3 wish to bring in regarding Mr. Gorton's net worth during the  
4 main trial other than the transfers to the family limited  
5 partnerships and to the IRA? Is there anything else you want  
6 to bring in?

7 MR. POMERANTZ: Well, your Honor, I think his net  
8 worth falls into three buckets; it is the assets that are in  
9 the family limited partnerships, it is the assets that are in  
10 the IRA, and then there are assets that are outside of those  
11 two -- and those assets are the smallest of the three buckets  
12 so that would be the three that we think add up to, so far as  
13 we know, add up to his total net worth and we would want to  
14 bring that in for the various claims that we would be trying on  
15 the merits.

16 THE COURT: What is in No. 3? I take it that is  
17 already in the record?

18 MR. POMERANTZ: What is that comprised of, what is in  
19 bucket No. 3?

20 THE COURT: Yes.

21 MR. POMERANTZ: I don't recall all of it. Mr. Gorton  
22 testified under oath at the asset freeze hearing, I do believe  
23 there is bank accounts. That was probably the largest category  
24 at that time. Those numbers have changed since then.

25 THE COURT: Okay.

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1 MR. POMERANTZ: That was the largest number. And then  
2 there were smaller, I think, investments that he held -- oh,  
3 and his home -- and his home was also a significant asset. And  
4 so those comprise -- I probably now -- I think it is bank  
5 accounts, the home and smaller investments, and the three of  
6 those together add up to much less than either the IRA or the  
7 assets in the family limited partnerships.

8 THE COURT: Right. Okay. Thank you.

9 Unless anyone wants to raise a preliminary matter, I  
10 think we are then ready for Mr. Gorton's voir dire. If you are  
11 ready, then Mr. Gorton, could you please come to the witness  
12 stand?

13 MR. POMERANTZ: Your Honor, shall I be all the way  
14 back here?

15 THE COURT: You can be anywhere in front of the jury  
16 box.

17 MR. POMERANTZ: Thank you.

18 MARK GORTON,

19 called as a witness by the Defendant,

20 having been duly sworn, testified as follows:

21 MR. POMERANTZ: Your Honor, may we have a moment to  
22 shift seats?

23 THE COURT: That's fine.

24 Mr. Gorton you may want to move your mic down to avoid  
25 feedback. There are pretty bad acoustics in here.

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1 MR. POMERANTZ: Thank you, your Honor.

2 MR. BAIO: These are the two areas we discussed on the  
3 phone, your Honor.

4 THE COURT: Yes.

5 DIRECT EXAMINATION

6 BY MR. BAIO:

7 Q. Mr. Gorton, are you married?

8 A. Yes.

9 Q. When did you get married?

10 A. June 9th, 2001.

11 Q. And what is your wife's name?

12 A. Jody.

13 Q. How many children do you have?

14 A. Four.

15 Q. Now, after you married your wife in 2001, did you own any  
16 assets or property jointly?

17 A. Yes.

18 Q. What assets?

19 A. Two bank accounts we owned jointly.

20 Q. And when did you open those bank accounts?

21 A. 2002.

22 Q. And when you say joint bank accounts, what percentage did  
23 you own and what percentage did she own?

24 A. Half each.

25 Q. Are there any other assets that you jointly own with your

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Gorton - direct

1 wife?

2 A. Yes.

3 Q. And what are those?

4 A. Our house.

5 Q. And when did you buy the house?

6 A. In June 2005.

7 Q. And what percentage of the house do each of you own?

8 A. Half.

9 Q. Do you own any other homes, either separately or jointly?

10 A. No.

11 Q. And, have you ever owned any other homes?

12 A. No.

13 Q. Now, when was your first child born?

14 A. Mira was born January 8, 2003.

15 Q. And, did you have any discussions about estate planning  
16 after your first child was born in 2003?

17 A. Yes.

18 Q. With whom?

19 A. My accountant recommended that I should start doing some  
20 estate planning.

21 Q. And, did you do any in 2003?

22 A. No.

23 Q. Why not?

24 A. I was busy and it's easy to procrastinate about planning  
25 for your death.

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Gorton - direct

1 Q. When was your second child born?

2 A. Zach was born April 30th, 2004.

3 Q. Did you take any steps after your second child was born in  
4 dealing with estate planning?

5 A. Yes.

6 Q. What did you begin to do in 2004?

7 A. Well, again, I got recommendations that I should do estate  
8 planning so I knew in order to do this I would need a lawyer.

9 And one of my friends was a lawyer so I asked him if he could

10 ask around. He had previously worked at Kay Scholer, asked if

11 he could find someone who specialized in that area. He asked

12 around and it turned out that the brother of a partner at Kay

13 Scholer specializes in estate and trust work and he recommended

14 him to me.

15 Q. And who was that person?

16 A. Ken Rubinstein.

17 Q. Did you contact Mr. Rubinstein?

18 A. Yes.

19 Q. When, for the first time?

20 A. December 2004.

21 Q. And, did you meet with Mr. Rubinstein?

22 A. Yes.

23 Q. When?

24 A. In January 2005.

25 Q. Now, after having met with him, did you undertake any steps

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Gorton - direct

1 in furtherance of estate planning?

2 A. Yes.

3 Q. What did you ultimately do?

4 A. I set up five family limited partnerships.

5 Q. Why five?

6 A. It was one for each of the companies I ran.

7 Q. And, how did the family limited partnerships help your  
8 estate planning?

9 A. By transferring assets to my wife and my children it  
10 reduced the size of my estate so in the event that I died,  
11 there would be less assets which were required to pay taxes on.

12 Q. What percentage of Lime Wire did you own before that  
13 transfer?

14 A. 87 percent.

15 Q. And, was that in your own name?

16 A. It was in the name of Lime Group, LLC.

17 Q. And, you transferred your 87 percent ownership interest in  
18 Lime Wire to this family limited partnership, correct?

19 A. Yes.

20 Q. Where, by the way, or who owned the other 13 percent?

21 A. Other investors.

22 Q. And what was the name of that family limited partnership?

23 A. It was the MJ Gorton Lime Wire Family Limited partnership.

24 Q. Now, after the transfer did you own any percentage of the  
25 family limited partnership?

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Gorton - direct

1 A. Yes. I owned 48 percent.

2 Q. I'm sorry?

3 A. 48 percent.

4 Q. And, what percentage do you own today?

5 A. 48 percent.

6 Q. And, what percentage of the family limited partnership did  
7 your wife own after the creation of the family limited  
8 partnership?

9 A. 48 percent.

10 Q. And, what percentage does she own today?

11 A. 48 percent.

12 Q. And, did your two children, who had then been born, did  
13 they own any part of or have any ownership interest in that  
14 family limited partnership?

15 A. Yes.

16 Q. What did they own?

17 A. They each had 2 percent.

18 Q. And, was that true for all of the family limited  
19 partnerships that you set up at that time?

20 A. Yes.

21 Q. Now, at the time you created these family limited  
22 partnerships did you consider transferring all of those assets  
23 just to your wife and children?

24 A. No.

25 Q. When did you sign the documents that finalized the family

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Gorton - direct

1 trust -- the family partnerships?

2 A. June 30th, 2005.

3 Q. And, how was that day selected?

4 A. It was selected because it was month-end and in order to  
5 set up the partnerships, we needed to get a proper valuation of  
6 the assets and some of the assets were only valued monthly.

7 Q. And when was that date established; that is, you would be  
8 signing the documents on June 30th, 2005?

9 A. A week or two beforehand.

10 Q. And who did that? Who set that date?

11 A. It was done by Elizabeth Weiner.

12 MR. BAIIO: Your Honor, may I approach and show the  
13 witness a document relating to that?

14 THE COURT: Yes. If you have one for the Court?

15 MR. BAIIO: I do. Yes, your Honor. And your Honor,  
16 this document has been marked as Defendant's Exhibit 133.

17 BY MR. BAIIO:

18 Q. Mr. Gorton, can you look at this and tell me what it  
19 appears to be?

20 A. It is an e-mail exchange between Elizabeth Weiner and  
21 myself.

22 Q. And, who is Elizabeth Weiner at the time?

23 A. She was an accountant who worked for me.

24 Q. And, what is your understanding as to the subject matter of  
25 this e-mail?



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Gorton - direct

1 A. It's selecting the date on which to finalize signing the  
2 family limited partnership documents.

3 Q. And, where is the suggestion -- which e-mail suggests the  
4 date of June 30th?

5 A. Liz writes: Do you want to sign everything on June 30th?

6 Q. And your response was?

7 A. That works for me. I'll check with Jody.

8 Q. And did you check with Jody?

9 A. Yes.

10 Q. And, did you in fact execute the family limited partnership  
11 documents on June 30th, 2005?

12 A. Yes.

13 Q. And, just a few days before that did you also close on your  
14 house that you co-owned with your wife?

15 A. Yes.

16 Q. Now, did you have other assets that you transferred --  
17 strike that.

18 On June 30th, 2005, did you transfer all the assets  
19 that you owned into family limited partnerships?

20 A. No.

21 Q. What assets did you not transfer into the family limited  
22 partnerships?

23 A. Some bank accounts, some stock holdings, some holding in  
24 investment funds.

25 Q. Was there a time when you created another family limited

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Gorton - direct

1 partnership?

2 A. Yes.

3 Q. When was that?

4 A. In 2007.

5 Q. And, what family limited partnership was that?

6 A. That was the MJ Gorton Lime Spot Family Limited  
7 Partnership.

8 Q. And what is Lime Spot?

9 A. It is another software company that I started.

10 Q. And, why did you create that family limited partnership?

11 A. That was the structure that I have used to hold all the  
12 companies which I have created.

13 Q. And, what was the ownership structure of the Lime Spot  
14 Family Limited Partnership after it was formed?

15 A. At that time my wife and I had our third child and it was 2  
16 percent for each of our children and the remaining 94 percent  
17 was split evenly between Jody and me, 47 percent a piece.

18 Q. So, you retained a 47 percent interest in that; correct?

19 A. Yes.

20 Q. And did you at the time consider transferring that 47  
21 percent to your wife or children?

22 A. No.

23 Q. After the creation of that family limited partnership did  
24 you take any additional estate planning steps?

25 A. Yes.

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Gorton - direct

1 Q. And what have they been?

2 A. Well, we've set up -- my wife and I have set up educational  
3 funds, I guess 529 plans for our children, and we have gifted  
4 to our children money within the limits allowed by the tax  
5 code.

6 Q. Now, did you also come to learn that in addition to estate  
7 planning there was another benefit to the creation of the  
8 family limited partnerships?

9 A. Yes.

10 Q. And what was that?

11 A. I learned that in the event that there was a claim against  
12 me the assets that did not belong to me would not be subject to  
13 that claim.

14 Q. And, did you understand that the assets that did belong to  
15 you were subject to claims?

16 A. Yes.

17 Q. And is that why you created the family limited  
18 partnerships?

19 A. No.

20 Q. Other than birthday gifts and the like, have you  
21 transferred any other money to family members?

22 A. No.

23 Q. Have you taken any steps to conceal any assets that you  
24 own?

25 A. No.

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Gorton - direct

1 Q. Have you opened any offshore bank accounts?

2 A. No.

3 Q. Now, that would be my examination on that subject, your  
4 Honor. I don't know what will be asked about the legal  
5 decision that occurred and that's part of why we are doing  
6 this, to see where it goes and what the witness can and cannot  
7 say in response to questions.

8 THE COURT: All right. Perhaps we should have  
9 examination by plaintiff's counsel now, on this topic.

10 MR. BAIO: Okay. Thank you.

11 THE COURT: Thank you.

12 CROSS EXAMINATION

13 BY MR. POMERANTZ:

14 Q. Mr. Gorton, good morning.

15 A. Good morning.

16 Q. If you would open up the notebook and take out a time line  
17 that's in the front pocket of the notebook and just sort of  
18 keep that out in front of you? Because we are going to, from  
19 time to time, be referring to that time line. Maybe we will  
20 start with the time line. If you can look at that, I just want  
21 to make sure that you agree with me on the dates that are set  
22 forth on the time line. The first date is December 10, 2004,  
23 which is when the United States Supreme Court announced that it  
24 was going to review the Grokster case. Do you have any reason  
25 to believe that that date is not accurate?

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Gorton - cross

1 A. No.

2 Q. Then, the next date down below that is January 7th, 2005,  
3 and it says that is the first meeting that you had with  
4 Mr. Rubinstein. Do you have any reason to believe that that's  
5 not accurate?

6 A. No.

7 Q. And then the Supreme Court issued its ruling in the  
8 Grokster case on June 27, 2005. Do you have any reason to that  
9 that's not accurate?

10 A. No.

11 Q. And then three days later you transferred assets into  
12 family limited partnerships. Do you have any reason to think  
13 that that date is not accurate?

14 A. No.

15 Q. When the United States Supreme Court issued its ruling in  
16 the Grokster case you read that ruling, correct?

17 A. Yes.

18 Q. And you read that Grokster lost, correct?

19 A. Yes.

20 Q. And Grokster was a decentralized peer-to-peer service just  
21 like Lime Wire, correct?

22 A. Yes.

23 Q. And you had said three months earlier that if Grokster lost  
24 that case your Lime Wire business would cease to exist.

25 Correct?

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Gorton - cross

1 A. That's not what I said.

2 Q. Well, let's go look at the exact words. Turn to tab 6.

3 And if you look, fourth paragraph down in the article it

4 states: If the Supreme Court says it is illegal to produce

5 this software Lime Wire, the company, will cease to exist.

6 Do you see that?

7 A. Yes.

8 Q. And that is what you told the New York Times in March of

9 2005, correct?

10 A. Yes.

11 Q. And after the United States Supreme Court issued its ruling

12 in Grokster you did not shut down Lime Wire, correct?

13 A. Yes.

14 Q. That's correct, right?

15 A. Yes.

16 Q. And you continued to operate Lime Wire, correct?

17 A. Yes.

18 Q. And three days after the Supreme Court issued its decision

19 you moved your assets into -- certain assets into family

20 limited partnerships, correct?

21 A. Yes.

22 Q. So, in this window that we have reflected on the time line

23 between December 2004 and June 2005 two things are happening at

24 the same time; one is that the United States Supreme Court

25 announces it is going to review Grokster and then decides

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Gorton - cross

1 Grokster, and the other is that you are meeting with  
2 Mr. Rubinstein and creating family limited partnerships;  
3 correct?

4 MR. BAIO: Your Honor, do I get to object? I'm not  
5 really sure whether it serves a purpose here.

6 THE COURT: Let me note that because this is voir dire  
7 I'm going to permit some questioning that would not be  
8 permitted in front of a jury tying things together, some  
9 argumentation, just so that I can quickly understand the  
10 points.

11 MR. BAIO: Understood, your Honor.

12 MR. POMERANTZ: And, your Honor, I should say up front  
13 what I am going to try to do through my questioning is to show  
14 that without knowing what Mr. Gorton and Mr. Rubinstein  
15 discussed and what the legal advice was during this time  
16 period, it is not fair -- we will not have a fair opportunity  
17 to test the story that Mr. Gorton just told you.

18 THE COURT: I follow you.

19 MR. POMERANTZ: That's what I am seeking to do here.

20 THE COURT: I follow you.

21 BY MR. POMERANTZ:

22 Q. Mr. Gorton, I want to focus on the time period before  
23 December 10, 2004, okay, that period and earlier.

24 One thing that was going on before December 10, 2004  
25 based on what you just said, is that you were thinking about

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Gorton - cross

1 estate planning, correct?

2 A. Yes.

3 Q. And in your testimony you had been thinking about it for at  
4 least a couple of years before you did anything about it at the  
5 end of 2004, correct?

6 A. Yes.

7 Q. But you actually didn't do anything about creating an  
8 estate plan until after December 10, 2004, correct?

9 A. Yes.

10 Q. And you don't have any documents that show that you were  
11 thinking about estate planning before December 10, 2004,  
12 correct?

13 A. Yes.

14 Q. That's correct?

15 THE COURT: I think when you add correct you inject  
16 ambiguity into your questioning.

17 MR. POMERANTZ: Okay.

18 Q. Do you have any documents that show that you were thinking  
19 about estate planning before December 10, 2004?

20 A. None that I know of.

21 Q. Did you contact a lawyer about protecting your estates  
22 through estate planning at any time prior to December 10, 2004?

23 A. No.

24 Q. So, it is fair to say that, at least from your testimony,  
25 that in the years 2003-2004 you were thinking about estate



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Gorton - cross

1 planning, correct?

2 A. Yes.

3 Q. But during that same period of time you were also thinking  
4 about Lime Wire's liability for copyright infringement,  
5 correct?

6 A. Maybe a little bit.

7 Q. Well, you were aware that there was a significant risk that  
8 Lime Wire would get sued for copyright infringement way back in  
9 2001, correct?

10 A. I wouldn't put it that way.

11 Q. Well, let me ask you to turn to tab 5. This is an offering  
12 memorandum that Lime Wire wrote back in 2001, correct?

13 A. Yes.

14 Q. And if you could turn to page 7 you see a heading there in  
15 the middle of the page, it says litigation risks. Do you see  
16 that?

17 A. Yes.

18 Q. And, in the middle of that paragraph there is a sentence  
19 that states: Lime Wire faces a significant risk that the RIAA  
20 will attempt to limit its ability to promote the Gnutella  
21 network through lawsuits and other judicial means.

22 Do you see that?

23 A. Yes.

24 Q. And then later on in that paragraph you state: However,  
25 there are no assurances that Lime Wire would be successful in

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Gorton - cross

1 any lawsuit brought by the RIAA.

2 Do you see that?

3 A. Yes.

4 Q. And at the end of that sentence you also say that the  
5 damages of any such suit may be substantial; correct?

6 A. Yes.

7 Q. So, that's what you knew as early as 2001, correct?

8 A. This is a part of a risk section of an offering document  
9 which is designed to highlight and perhaps exaggerate risks to  
10 investors. I mean, it contains a lot of things. It's kind of  
11 legal cover-your-butt language.

12 Q. All right.

13 You also had concerns about Lime Wire's exposure to  
14 copyright liability after the record company sued Grokster,  
15 correct?

16 A. I don't know.

17 Q. Let's take a look at tab 7 and see if we can use this  
18 document to refresh your recollection. You wrote the document  
19 that's behind tab 7, correct?

20 A. Yes.

21 Q. And you say at the top -- let's date this document. If you  
22 look at the next page, Mr. Gorton, this is what is referred to  
23 as metadata that accompanies an electronic document and do you  
24 see that 10 lines down there is a line that says create date  
25 and it says 10/4/2001?

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Gorton - cross

1 Do you see that?

2 A. Yes.

3 Q. Do you have any reason to believe you didn't write this  
4 document around October of 2001?

5 A. No.

6 Q. And, in the very first line you say a note from Mark Gorton  
7 on the issue of potential lawsuits against Lime Wire and its  
8 impact of the open source community. Do you see that?

9 A. Yes.

10 Q. And you say in the first sentence that the -- the next  
11 sentence: The lawsuits recently filed against Morpheous,  
12 Grokster and FastTrack by the RIAA and the internal RIAA memos  
13 recently released raise the specter of legal action against  
14 Lime Wire.

15 Do you see that?

16 A. Yes.

17 Q. So, you knew by 2001 that Lime Wire was a target of a  
18 potential lawsuit, correct?

19 A. I knew that Lime Wire lived in a world in which litigation  
20 was happening around it.

21 Q. I'm sorry, I didn't hear you. I apologize.

22 A. I said Lime Wire existed in a world where litigation was  
23 taking place around it.

24 Q. Well, Lime Wire knew that it was a target of a potential  
25 lawsuit, correct?

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Gorton - cross

1 A. I think that's a bit strong.

2 Q. You wrote that Lime Wire raises the specter of legal action  
3 against Lime Wire; correct?

4 A. Yes. I think that's not as strong as it was a target of a  
5 lawsuit.

6 Q. Now, because of the legal risks that Lime Wire faced, you  
7 went and sought legal advice about the copyright laws, correct?

8 A. Yes.

9 Q. And one of the lawyers that provided you with legal advice  
10 about the copyright laws is Fred Von Lohmann, right?

11 A. Yes.

12 Q. And you started consulting with Mr. Von Lohmann on  
13 copyright issues around 2002, correct?

14 A. I don't remember the date.

15 Q. Well, let's look at tab 13. And, Mr. Gorton, this is what  
16 we refer to as a privilege log and actually I think I referred  
17 you to the wrong tab. I think what I want to do is tab 14. Is  
18 that right? Does tab 14 at the top say Fred Von Lohmann's  
19 privilege log?

20 THE COURT: 13 says that.

21 MR. POMERANTZ: Okay, so I have a different -- so  
22 that's what I want, 13.

23 Q. Just by way of example, Mr. Gorton, if you could turn to  
24 page 7 of 8 of this privilege log. And you see in that, for  
25 example, in lines 95 and 103 and 104 and 106 you see you and

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Gorton - cross

1 Mr. Von Lohmann having communications relating to legal advice  
2 about copyright law. Do you see that?

3 A. Yes.

4 Q. And you understand that none of these were produced to us,  
5 correct?

6 A. Yes.

7 Q. And also on this page, again around the 2002 time period,  
8 Mr. Von Lohmann is also engaged in providing legal advice to  
9 other employees at Lime Wire. Do you see that?

10 A. Yes.

11 Q. And you also had communications with another lawyer before  
12 December 2004 about copyright issues, correct?

13 A. I don't know.

14 Q. Do you know a gentleman by the name of Joshua Wattles?

15 A. Yes.

16 Q. He's a lawyer, correct?

17 A. Yes.

18 Q. And he provided you with legal advice regarding copyright  
19 issues, correct?

20 A. Yes.

21 Q. And you have claimed privilege over your communications  
22 with Mr. Wattles, correct?

23 A. Yes.

24 Q. And you have claimed privilege over your communications  
25 with Mr. Von Lohmann, correct?

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Gorton - cross

1 A. Yes.

2 Q. And if you turn to tab 12, this is a privilege log that was  
3 provided to us by Lime Wire and yourself as well, this is the  
4 defendant's privilege log. And if you turn to page 5 of 36 you  
5 will see some references to communications between Mr. Wattles  
6 and Mr. Von Lohmann, copy to you, concerning things such as the  
7 RIAA subpoenas and an order in the Grokster case.

8 Do you see that?

9 A. On page?

10 Q. Page 5.

11 A. Yes.

12 Q. So, it is fair to say going back to our time line that  
13 prior to December 10, 2004, you were getting legal advice about  
14 copyright issues relating to Lime Wire, correct?

15 A. Yes.

16 Q. And you also say that you were thinking about estate  
17 planning at the same time, correct?

18 A. I mean roughly contemporaneous.

19 Q. So now let's return to the period in that little gap in the  
20 middle of the time line.

21 You met with Mr. Rubinstein on January 7, 2005, that  
22 was a face-to-face meeting, correct?

23 A. Yes.

24 Q. And Mr. Rubinstein took notes during that meeting, correct?

25 A. He might have.

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Gorton - cross

1 Q. If you could turn to tab 14, and you will see on the top if  
2 I have the right document this time it says privilege log,  
3 Kenneth Rubinstein, Esquire. Do you see that?

4 A. Yes.

5 Q. If you turn to the third page, a little more than halfway  
6 down you see an entry for 1/7/2005. Do you see that?

7 A. Third page?

8 Q. Yes, 3 of 4.

9 A. January 7?

10 Q. Yes.

11 A. Oh yes. Okay.

12 Q. And you see that over on the column on the right with the  
13 description it says: Counsel's handwritten notes re meeting  
14 with clients seeking estate planning legal advice.

15 Do you see that?

16 A. Yes.

17 Q. Does that refresh your recollection that Mr. Rubinstein was  
18 taking notes during your first meeting with him?

19 A. No.

20 Q. Now, you have claimed privilege over what you and  
21 Mr. Rubinstein discussed during that meeting, correct?

22 A. Yes.

23 Q. And you have claimed privilege over Mr. Rubinstein's  
24 handwritten notes, correct?

25 A. I assume so.

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Gorton - cross

1 Q. So, you can't tell us whether the word Grokster came up  
2 during that meeting, correct?

3 A. No.

4 Q. You can't tell us whether Mr. Rubinstein's notes say the  
5 word Grokster, correct?

6 A. I don't know.

7 Q. And you can't tell us whether you told Mr. Rubinstein in  
8 that meeting that you wanted to protect your personal assets  
9 from a possible judgment by the record companies, correct? You  
10 can't tell us that because you asserted the privilege?

11 A. Yes, I asserted the privilege.

12 Q. And you have asserted the privilege over all of your  
13 communication with Mr. Rubinstein, correct?

14 A. As far as I know.

15 Q. Right up to June 30th, 2005, correct?

16 A. I assume so.

17 Q. You have asserted privilege over all of your communications  
18 with Mr. Rubinstein about why you created the family limited  
19 partnerships, correct?

20 A. We, I guess, asserted privilege over all the communication.

21 Q. And because you have asserted the attorney-client privilege  
22 with respect to your communications with Mr. Rubinstein, that  
23 meant that Mr. Rubinstein refused to answer our questions  
24 during a deposition about his communications with you. You're  
25 aware of that, correct?



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Gorton - cross

1 A. No.

2 Q. Do you recall the hearing we had three floors down last  
3 summer relating to our motion to freeze assets?

4 A. Yes.

5 Q. And you testified during that hearing, correct?

6 A. Yes.

7 Q. And, do you recall that a few days before that hearing your  
8 lawyers told us that you were going to waive your privilege  
9 with respect to your communication with Mr. Rubinstein?

10 MR. BAIO: I'm not sure where this is going.

11 THE COURT: I do recall this. You don't need to -- if  
12 this is to remind me you don't need to remind me.

13 MR. POMERANTZ: All right. And he testified to that  
14 during the hearing, your Honor. It was his personal knowledge  
15 of that that we brought out at that hearing and I won't go over  
16 that again.

17 THE COURT: Yes.

18 BY MR. POMERANTZ:

19 Q. Another thing I won't go over again, Mr. Rubinstein's  
20 website; you recall that we had some discussions about that  
21 last summer?

22 A. Yes.

23 Q. But you won't tell us whether the things that are reflected  
24 in that website are things that you actually discussed with  
25 Mr. Rubinstein during the time that he was providing legal

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Gorton - cross

1 advice to you, right?

2 A. I don't know what is in the website.

3 Q. Well, you understand that we have filed a claim against you  
4 that's called a fraudulent conveyance claim?

5 A. Yes.

6 Q. And you understand that that claim asserts that your  
7 transfer of the assets into the family limited partnerships on  
8 June 30th, 2005 is a fraudulent conveyance?

9 A. Yes.

10 Q. Are you aware that Mr. Rubinstein's website discusses the  
11 risks of a fraudulent conveyance?

12 A. No.

13 Q. Are you aware that that website says that you should say  
14 that a conveyance into a family limited partnership is for  
15 estate planning purposes in order to have a defense on a  
16 fraudulent conveyance claim?

17 MR. BAIO: I would probably assert lack of foundation  
18 on that.

19 THE COURT: Yes.

20 You may answer if you are aware.

21 THE WITNESS: Well, I don't know what is on the  
22 website.

23 BY MR. POMERANTZ:

24 Q. But, if you and Mr. Rubinstein discussed the fact that you  
25 should say that you were doing the family limited partnership

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Gorton - cross

1 transfers for estate planning purposes in order to defend  
2 yourself against a fraudulent conveyance claim, you won't  
3 answer that question because you're asserting privilege,  
4 correct?

5 A. I'm a little -- the question was a little complicated.

6 Q. Yes, it was a really poor question. I will try it again.

7 You won't tell us anything that you and Mr. Rubinstein  
8 discussed during your conversations, correct?

9 A. That's correct.

10 Q. Including whether he advised you to say that you were doing  
11 these transfers for estate planning purposes, correct?

12 A. Correct.

13 Q. But these transfers did not occur until June 30th, 2005,  
14 correct?

15 A. Yes.

16 Q. And that happened after all of these communications with  
17 Mr. Rubinstein, correct?

18 A. Yes.

19 Q. Mr. Baio showed you Defendant's Exhibit 133 which is a  
20 chain of e-mails?

21 A. Yes.

22 Q. Do you see the redacted stamp that is on the first page of  
23 this four different times?

24 A. Yes.

25 Q. Do you know what's been redacted from this document?

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Gorton - cross

1 A. No.

2 Q. Do you understand that's been redacted because you're  
3 asserting the privilege?

4 A. Yes.

5 Q. At the time that you transferred the assets into the family  
6 limited partnerships on June 30, 2005, you were aware that that  
7 transfer could protect your assets in the event of a legal  
8 judgment against you personally, correct?

9 A. To some extent, yes.

10 MR. POMERANTZ: Your Honor, that's all the questioning  
11 I have on this particular subject.

12 THE COURT: Okay.

13 Anything further from defense counsel?

14 MR. BAIO: No, your Honor.

15 THE COURT: Thank you, Mr. Gorton. You may step down.

16 MR. BAIO: We had another subject.

17 THE COURT: Oh yes.

18 MR. BAIO: The second subject.

19 THE COURT: Go ahead with your --

20 MR. POMERANTZ: Your Honor, that is not the case. I  
21 went back and read the transcript of the call on Friday where  
22 this issue came up. Your Honor only asked about the family  
23 limited partnerships. Your Honor's ruling with respect to the  
24 Bilzerian issue dealt with two different subjects, both of  
25 which we have briefed and both of which your Honor actually

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Gorton - cross

1 ordered, one relating to Mr. Gorton's view of the lawfulness of  
2 his conduct in running Lime Wire and the other was with respect  
3 to the lawfulness of the establishment of the family limited  
4 partnerships. Your Honor only asked about the family limited  
5 partnerships, I believe, in that call.

6 The other issue has been briefed and ruled upon and I  
7 believe your Honor's questioning was only with respect to the  
8 family limited partnership. I don't think we are re-opening  
9 the door to --

10 THE COURT: I focused on the family limited  
11 partnerships because I had far less factual information about  
12 them collected in any one place where I could put it all  
13 together -- which you have helpfully done -- now, but I would  
14 like to hear voir dire on the good faith.

15 MR. BAIO: And your Honor, I think when you look at  
16 the transcript you will see that I identified a series of  
17 questions having to do with what Mr. Gorton could or couldn't  
18 testify to in light of the various rulings that you have had.  
19 And that's part of what this is about.

20 THE COURT: Yes.

21 DIRECT EXAMINATION

22 BY MR. BAIO:

23 Q. Mr. Gorton, did Lime Wire generate any operating profits?

24 A. Yes.

25 Q. And what are operating profits?

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Gorton - direct

1 A. The differences between -- or the difference between  
2 revenues and operating expenses.

3 Q. And, what did Lime Wire do with its operating profits over  
4 its existence?

5 A. Well, two things: One is made distributions to investors;  
6 and secondly, it re-invested in the business.

7 Q. How much money have you and entities in which you have an  
8 interest, including the family limited partnership, received  
9 from Lime Wire since its inception?

10 A. \$31 million. 31.

11 Q. When was the last time there was a distribution of profits  
12 to the family limited partnership or any other owners of  
13 Lime Wire?

14 A. February of 2008.

15 Q. And, did Lime Wire have operating profits since February of  
16 2008?

17 A. Yes.

18 Q. And, what did Lime Wire do with those operating profits?

19 A. It invested in building a subscription music service.

20 Q. And what was Lime Wire's plan for that subscription music  
21 service?

22 A. The plan had two parts: The first was the Lime Wire music  
23 store which was a website which sold licensed independent music  
24 online; and the second part was a conversion plan in which  
25 Lime Wire proposed to attempt to convert free peer-to-peer

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Gorton - direct

1 users to paying users of a licensed music subscription service.

2 Q. And, what happened with that service?

3 A. We had extensive negotiations with the record industry,  
4 major record labels primarily, but also the music publishers  
5 and the independent labels, and we were never able to reach a  
6 deal with all of the parties and we were never able to launch  
7 that service.

8 MR. POMERANTZ: Your Honor, although we are going  
9 to -- I'm not going to interrupt because we are only in voir  
10 dire. I do believe he has potentially crossed the line with  
11 respect to one of your *in limine* rulings with respect to  
12 settlement.

13 THE COURT: I understand.

14 MR. BAIO: Your Honor, that is what I would like to  
15 argue because there are a number of things and I will read from  
16 your -- actually, that's my examination but in the summary  
17 judgment decision, your Honor, on page 53, you held that Gorton  
18 conceived of and was heavily involved in developing the  
19 conversion plan. He represented Lime Wire in negotiations with  
20 the recording industry over the conversion plan.

21 In addition, in the letter that they sent to you on  
22 Friday they said specifically, in paragraph 28, that one of the  
23 findings is that Mr. Gorton represented Lime Wire in  
24 negotiations with the recording industry over the conversion  
25 plan.

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Gorton - direct

1           This is not discussing settlement. It is not  
2           discussing anything other than what was permitted and  
3           actually --

4           THE COURT: And if you were to articulate for the  
5           record what the relevance of that is how would you articulate  
6           it?

7           MR. BAIO: I would say that it is relevant, certainly  
8           as the way that they have articulated it in their letter which  
9           was that it was a finding that they're asking you to read to  
10          the jury and that there was a plan to move from free to a  
11          subscription service.

12          THE COURT: And the relevance of that, again, is what?

13          MR. BAIO: The relevance of that is that that's where  
14          the money went, among other things.

15          MR. POMERANTZ: Your Honor, I believe Mr. Baio is  
16          mistaken about what we ask your Honor to read to the jury. We  
17          only have five findings and those are in our proposed  
18          instruction.

19          The letter we sent on Friday was solely for the  
20          purpose of enforcing your Honor's order regarding the inability  
21          to offer evidence inconsistent with factual findings and we  
22          simply wanted to have a handy list for everyone to be able to  
23          refer to in the event some evidence is offered that we think is  
24          inconsistent with prior orders. And we will submit a list,  
25          your Honor with a check list and citation to the order.



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Gorton - direct

1           May I request the following, your Honor? We did not  
2 anticipate subjects beyond the FLPs as part of this voir dire  
3 and I understand your wants to hear this other part. We could  
4 quickly craft a short line of questioning for Mr. Gorton over a  
5 lunch break and I'm sure it would be very short given that the  
6 length of their examination and we would be prepared to finish  
7 that examination and then argue whatever issues your Honor  
8 wants to argue with respect to the Bilzerian issues after that  
9 short examination.

10           THE COURT: All right. I'm attempting to speculate as  
11 to what you each would argue with respect to Rule 403 on no. 28  
12 of plaintiff's letter where the money went. I will ask you to  
13 argue that after lunch.

14           Okay. Let's take a lunch break, then. Shall we say  
15 until 1:45?

16           MR. POMERANTZ: That's fine, your Honor.

17           THE COURT: Is that more time than you need?

18           MR. BAIIO: Yes, your Honor. Thank you.

19           THE COURT: Thank you.

20           (Luncheon recess)

21           (Continued next page)

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1 MR. BAIO: I was done, your Honor. Did you want  
2 argument or did you want more testimony.

3 THE COURT: I thought we should take more testimony  
4 first.

5 MR. BAIO: OK.

6 I assume, your Honor, at the trial there will be one  
7 cross-examiner, not two.

8 MR. POMERANTZ: That is our plan, your Honor.

9 THE COURT: I would assume so. Thanks.

10 MR. BAIO: OK. This is not the same person.

11 THE COURT: All right. I remind you that you are  
12 still under oath, Mr. Gorton.

13 THE WITNESS: OK.

14 CROSS EXAMINATION

15 BY MR. KLAUS:

16 Q. Good afternoon, Mr. Gorton.

17 A. Good afternoon.

18 Q. Mr. Gorton, so we are clear, it is your testimony that you  
19 did not conceive of the plan of utilizing family limited  
20 partnerships in order to avoid potential legal exposure from  
21 being sued by the plaintiffs in this case or anyone else,  
22 correct?

23 MR. BAIO: Your Honor, I thought that we were moving  
24 to the second issue. That sounds like the first one.

25 THE COURT: I will take any testimony that is

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Gorton - cross

1 relevant. Would you repeat the question.

2 MR. KLAUS: Sure.

3 THE WITNESS: Thank you.

4 Q. It is your testimony, sir, that you did not conceive of the  
5 plan of utilizing family limited partnerships to avoid any  
6 potential legal exposure from being sued by the plaintiff in  
7 this lawsuit or anyone else, correct?

8 A. Correct.

9 Q. In fact, it is your testimony, sir, you have said under  
10 oath that at the time those transactions took place, June of  
11 2005, you did not believe that you or LimeWire would be sued  
12 for copyright infringement, correct?

13 A. Correct.

14 Q. You have said that the first time you were threatened with  
15 legal action by the plaintiffs in this case was on September  
16 13, 2005, when you received a cease and desist letter on behalf  
17 of them, correct?

18 A. Yes.

19 Q. Now, after September 13, 2005, you continued to have  
20 discussions with Mr. Von Lohmann regarding copyright law,  
21 correct?

22 A. I don't know.

23 Q. If I could ask you, sir, to turn to tab 13 in the binder  
24 that we gave you, page No. 8. Are you there?

25 A. Yes.

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Gorton - cross

1 Q. If I could ask you to look at entry No. 119 on the  
2 privilege log. Do you see that there is an entry dated  
3 December 10, 2006 from Mr. Von Lohmann to yourself and to  
4 Mr. Baker?

5 A. I see that.

6 Q. Looking at that, does that refresh your recollection that  
7 you continued to have discussions with Mr. Von Lohmann about  
8 copyright law after September of 2005?

9 A. No.

10 Q. You have no reason on doubt the accuracy of that entry, do  
11 you?

12 A. No, I do not.

13 Q. You had discussions, in fact, about your potential legal  
14 exposure with respect to this matter and LimeWire with  
15 Mr. Baker after September of 2005, correct?

16 A. I had lots of conversations with Mr. Baker.

17 Q. You had lots of communications with Mr. Baker about your  
18 potential exposure to liability with respect to this case,  
19 correct?

20 MR. BAIO: Which Mr. Baker? Is this the trial  
21 counsel.

22 MR. KLAUS: This is Mr. Charles baker.

23 A. Yes. So the question -- so I mean, I talked with him a  
24 lot. I mean, I hired him after the litigation had started.

25 Q. I understand that, sir.

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Gorton - cross

1 All I'm asking you is you had discussions with him,  
2 with Mr. Charles Baker regarding the subject of your potential  
3 legal exposure in connection with this case, correct?

4 A. Yes.

5 Q. You have claimed privilege over all of those conversations,  
6 correct?

7 A. Yes.

8 Q. So you are not going to tell us any of the matters that you  
9 discussed with Mr. Baker regarding your potential legal  
10 exposure, correct?

11 A. Yes.

12 Q. You are not going to tell us the conversations that you had  
13 with any of your litigation counsel with respect to your  
14 potential legal exposure in this matter, that's right, isn't  
15 it?

16 A. Correct.

17 Q. You are not going to tell us any conversations that you had  
18 with Mr. Von Lohmann regarding your potential legal exposure in  
19 this case with respect to this matter after September of 2005,  
20 correct?

21 A. Yes.

22 Q. Now, you continued to have discussions with Mr. Rubinstein  
23 after June of 2005, correct?

24 A. Yes.

25 Q. In fact, you had communications with Mr. Rubinstein or

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Gorton - cross

1 people in his office in 2006, right?

2 A. I don't know.

3 Q. Would you take a look at tab 14 of your binder, which is  
4 Mr. Rubinstein's privilege log.

5 A. Which page?

6 Q. The first page.

7 A. OK.

8 Q. Are you there?

9 A. Yes.

10 Q. If you look at the first several entries, do you see there  
11 entries involving communications from Ms. Camblin, who is  
12 someone who works in Mr. Rubinstein's office, with you in 2005,  
13 2006 and 2007? Do you see those entries?

14 A. Yes.

15 Q. You have no reason to doubt the accuracy of that log,  
16 correct?

17 A. No.

18 Q. So is it a fact you continued to have discussions with  
19 Mr. Rubinstein and people in his office in 2006, sir?

20 A. I see there's one e-mail. I am not sure that qualifies as  
21 discussions.

22 Q. If you look throughout this log you will see references to  
23 communications in, multiple communications in 2006 and 2007?

24 A. Yes.

25 Q. Would this log refresh your recollection that you continued

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Gorton - cross

1 to have discussions with Mr. Rubinstein's office in 2006 and  
2 2007, sir?

3 A. I have no memory of them, but I see that they are e-mails.

4 Q. Seeing those e-mails, you don't doubt their accuracy, do  
5 you?

6 A. No.

7 Q. Do you see on the first page of this log that you have a  
8 communication six or seven lines down dated September 26 of  
9 2008? You received a fax from Mr. Rubinstein; do you see that?

10 A. Yes.

11 Q. It is a fax transmission and attachments reflecting legal  
12 advice and work product re estate planning vehicle. Do you see  
13 that?

14 A. Yes.

15 Q. You don't have any reason to doubt the accuracy of that log  
16 entry, do you?

17 A. No.

18 Q. You're claiming privilege over all of your communications  
19 with Mr. Rubinstein and his office regarding the advice that  
20 they gave to you, correct?

21 A. Yes.

22 Q. So if you had discussions with Mr. Rubinstein regarding  
23 what actions you ought to take with respect to LimeWire to  
24 maintain the validity of your prior transfers, that's not  
25 information that you would be willing to share with us, would

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Gorton - cross

1 you?

2 A. I'm claiming privilege on all our communications.

3 MR. KLAUS: Thank you. No further questions, your  
4 Honor.

5 MR. BAIO: I have no other questions, your Honor, but  
6 I'm prepared to argue.

7 THE COURT: All right. You may step down, Mr. Gorton.

8 THE WITNESS: Thank you.

9 (Witness left the stand)

10 MR. BAIO: Your Honor, I think the driver on the  
11 objection is your -- at least the main one, there may be  
12 others -- is your ruling on the motion in limine concerning  
13 something very specific, and that is that the defendant  
14 cannot -- I want to get it right. He is not allowed to submit  
15 evidence of his good faith belief in the lawfulness of his  
16 conduct.

17 On both points, and I'll take them one at a time, we  
18 are not suggesting, and the testimony did not suggest that we  
19 are saying that he had a good-faith belief in the legality of  
20 his conduct when he established, for example, the conversion  
21 plan. It has nothing to do with his mindset, at least with  
22 respect to the legality of that conduct. We are not going to  
23 suggest to the jury that as a result that means the conduct was  
24 legal.

25 There are, however, a number of factors under Bryant.



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1 One of them, and as your Honor explained to me, the degree of  
2 willfulness counts. The jury must evaluate the degree. Again,  
3 I am not talking about the legality of the conduct. I'm  
4 talking about the conduct.

5 They will identify enhancing documents that  
6 demonstrate, in their view, a high level of willfulness. We  
7 believe that the jury should be entitled to see what was  
8 actually done to evaluate that conduct and to evaluate the  
9 degree of willfulness independent from legality. He was not  
10 suggesting that the conduct was legal. He was saying this is  
11 the conduct that we did.

12 Now, the same is true as to his position with respect  
13 to the events that occurred before he went to Mr. Rubinstein.  
14 He is saying that he had an intent to engage in estate  
15 planning. They can cross-examine him, as they did, without  
16 limit, as to when he started, when did it occur in relation to  
17 the Grokster decision, why did he wait so long. All of that is  
18 available to them in cross-examination.

19 Their reference to the legal advice that was received  
20 from 2002 and thereafter, including from trial counsel, is  
21 something that can actually be raised every time anyone ever  
22 had a lawyer. We didn't learn whether you did X or Y or  
23 whether you discussed those things with your lawyer. That's  
24 what the privilege does.

25 What the invocation of the privilege in this case has

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1 done for Mr. Gorton and LimeWire is preclude them from saying  
2 it was lawful, the conduct that they did. But those two points  
3 that I have identified really have nothing to do with that.

4 THE COURT: Tell me again what those two points are.

5 MR. BAIO: Yes, your Honor.

6 One is the use of proceeds from LimeWire and the  
7 amount of investment and the extent of activity in the  
8 conversion plan. The conversion plan was admitted in evidence  
9 on summary judgment. The conversion plan does show that there  
10 was an attempt to build a store which would require licenses,  
11 which they did not receive.

12 He's not suggesting that that event, that is, whatever  
13 money was received and was put into the creation of that store  
14 and that subscription service was lawful, but we are saying  
15 that this is where the money went. This is what was being  
16 built. And you should evaluate that, jury, in deciding the  
17 extent of the damages under, among other things, the expenses  
18 saved and the profits earned by the defendant, the conduct and  
19 attitude of the parties in respect of this very case, that is,  
20 what was LimeWire's conduct and attitude with respect to the  
21 business that they were building, and also the degree of  
22 willfulness.

23 There were other things that money could be spent on  
24 that show more willfulness, and they will bring that out. But  
25 what I am arguing here is that when you look at the actual

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1 conduct you need to see that conduct, jury, in order to  
2 evaluate what was done and what is the appropriate remedy.

3 Neither Mr. Gorton nor I will say what he did was  
4 legal and that what, the steps that he had taken he should have  
5 a defense because his conduct was legal or he relied on the  
6 advice of counsel.

7 Their questioning on, well, we will never know whether  
8 your lawyer told you that, that's true every time anyone has  
9 ever invoked the privilege. You will not know when the  
10 invocation is asserted.

11 So what we are trying to do, your Honor, is stay away  
12 from the idea, the evidence that what he was doing was lawful  
13 because you have precluded that. But that doesn't mean, and I  
14 think where their argument goes is he's not allowed to say  
15 anything and we're not allowed to say anything because we never  
16 know whether a lawyer said the opposite, even if an event  
17 actually occurred.

18 THE COURT: I am getting quite confused by this oral  
19 argument. Let me see if I can separate the points.

20 The point of the voir dire today was to have the  
21 individualized questioning and answers that you in your  
22 briefing proposed were required before there be a preclusion --

23 MR. BAIO: Yes.

24 THE COURT: -- of a declarant's testimony about his  
25 own good faith.

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1 MR. BAIO: Not his own good faith, your Honor. We  
2 also have the motion in limine relating to the summary judgment  
3 and nothing running afoul there.

4 THE COURT: Right.

5 MR. BAIO: So what we wanted to find out was whether  
6 these two areas stay within the scope of the Court's rulings.

7 THE COURT: All right.

8 Now, one area is the amount of investment and the  
9 conversion plan.

10 MR. BAIO: Yes. And the fact of the conversion plan  
11 and the amount of money that was put in after February of 2008  
12 in that plan. Many millions went into that particular  
13 approach, which was building the store, which actually did  
14 occur, but only with independent licenses, so third parties  
15 weren't involved.

16 THE COURT: Tell me what the relevance of that is  
17 again.

18 MR. BAIO: The relevance is, among other things, your  
19 Honor, Bryant factor number two, the expenses saved and profits  
20 earned by the defendant.

21 THE COURT: If he had put the money into the stock  
22 market and it went up or down, you are saying that's relevant?

23 MR. BAIO: They would have used that. They have a  
24 slide, your Honor, which says that he did this all for the  
25 money. And they are entitled to say that. We want simply the

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1 jury to see where the money went.

2 THE COURT: What if it went to take care of his ailing  
3 mother? I don't understand the relevance of it.

4 MR. BAIO: If it did take care of an ailing mother,  
5 that might not be an ameliorating factor. That might not show  
6 an absence or a softening of willfulness. They are going to  
7 say he is the most willful person ever.

8 THE COURT: Why does it necessarily show willingness?  
9 What if the testimony from plaintiffs is he's, who knows what  
10 they might say, he's so slippery, he's so impossible, of course  
11 we could never have any serious business dealings with him.

12 MR. BAIO: They can say all of that, your Honor.  
13 There is nothing precluding them whatsoever.

14 THE COURT: OK. I will hear them on that. What is  
15 the second point?

16 MR. BAIO: The second point, your Honor, is they are  
17 accusing Mr. Gorton of a fraudulent conveyance. So they say by  
18 clear and convincing evidence they can say that he intended to  
19 defraud them or other creditors.

20 What we simply want to do is allow Mr. Gorton to  
21 describe how it came about and what its economic effect was;  
22 that is, only a certain percentage went to his wife, went to  
23 his children, other assets were outside. It's factual.

24 It is factual as to the timing, and the other  
25 questions that I asked put it in its context. It has nothing

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1 to do with legal advice. It has nothing to do with their  
2 ability to cross-examine him. We are not asserting to the jury  
3 that he is relying on something that he learned in a good-faith  
4 belief that his conduct was lawful. That's not the point  
5 there. It is addressing their allegations.

6 THE COURT: I understand. I understand you have a  
7 work-around here.

8 MR. BAIO: Yes, it is a work-around. Actually, that  
9 is what we are trying to do, your Honor. We take your rulings  
10 and we are trying to find out where we can go and where we  
11 can't go. We think these two places are places that do not go  
12 afoul of your rulings. They still have sufficient and ample  
13 material to use to argue and to cross-examine the witness and  
14 we just want the jury to know these facts. That's it.

15 THE COURT: Let me hear from plaintiffs' counsel.

16 MR. POMERANTZ: Your Honor, if I may address  
17 Mr. Baio's two points in reverse order.

18 THE COURT: Yes.

19 MR. POMERANTZ: The second point he raised, trying to  
20 put his decision to put money into the FLPs into context, that  
21 is exactly what we briefed in the, what I will call the  
22 Bilzerian motion in limine and exactly what the court ruled  
23 upon.

24 What they want to do is to say what Mr. Gorton was  
25 thinking about why he put the money in there, I did it for

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1 estate planning purposes, and talk about the birth of his  
2 children, the marriage and all of that, but then deprive us of  
3 what he actually talked to his lawyer about, the person who  
4 created the FLPs with him.

5 His testimony has been that he didn't think of the  
6 FLPs. His lawyer advised him that that was the vehicle he  
7 should use. If you look at the questions that Mr. Baio asked  
8 him during his voir dire today, it exposes why we would be  
9 terribly prejudiced if we couldn't know exactly what  
10 Mr. Rubinstein and Mr. Gorton discussed.

11 So, for example, Mr. Baio asked him, I learned that  
12 assets didn't belong to me, so he asked him about,  
13 did he learn that if you create the FLPs it will protect your  
14 assets from a judgment. He said yes. And then Mr. Baio  
15 followed up, Is that why you created the FLPs? No.

16 You can't get, Mr. Gorton can't be allowed to testify  
17 to just a portion of his state of mind, which is exactly what  
18 he's doing, why did you create the family limited partnerships?  
19 This is precisely the issue your Honor addressed in the order  
20 that was issued. Your Honor cited to the declaration that  
21 Mr. Gorton had previously submitted in this case in which he  
22 said that the reason why he created the FLPs had nothing to do  
23 with his legal exposure for copyright infringement. That's  
24 exactly what he said, and your Honor quoted his declaration.  
25 Of course we can't know that for certain unless we know what

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1 his lawyers were telling him both about his exposure for  
2 copyright infringement and about what the creation of family  
3 limited partnerships may do to protect his assets in the event  
4 that that exposure was realized.

5 THE COURT: Just a moment.

6 Go ahead.

7 MR. POMERANTZ: Your Honor quotes a decision in the  
8 Pereira case in your order. First you cite to Bilzerian, then  
9 you cite this, the following: "Indeed a party cannot be  
10 permitted on one hand to argue that it acted in good faith and  
11 without an improper motive and then on the other hand to deny  
12 access to the advice given by counsel where that advice played  
13 a substantial and significant role in formulating actions taken  
14 by the defendants."

15 We know it is undisputed here that the family limited  
16 partnerships were created upon advice by Mr. Rubinstein. And  
17 know from Mr. Rubinstein's website what his general modus  
18 operandi is with respect to creating these kinds of family  
19 limited partnerships.

20 THE COURT: Now, as I understand it, at this point  
21 that will not be before a jury because Mr. Gorton claims not to  
22 have seen the website.

23 MR. POMERANTZ: No, your Honor. We will put it in  
24 front of the jury through Mr. Rubinstein. In other words, what  
25 we have the absolute right to do is to have Mr. Gorton explain



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1 what he did and then to have Mr. Rubinstein basically line up  
2 what he recommends publicly through his website and be able to  
3 show to the jury that Mr. Gorton in fact did exactly what  
4 Mr. Rubinstein recommends doing to someone who wants to shield  
5 their assets from a litigant. It's expressed in the -- we  
6 don't have to rely on privileged information to do that because  
7 it's right in his website.

8 THE COURT: Would the defense like to speak to that?

9 MR. BAIIO: Yes, your Honor. I understand that's what  
10 the cross-examination will be, and it will be significant. We  
11 are not trying to stop the evidence. What they are trying to  
12 do is take your Honor's ruling that said that the defendant may  
13 not say that he acted in a good-faith belief that his conduct  
14 was lawful, and that's not what he is saying anywhere, and they  
15 will test that through all of the evidence that Mr. Pomerantz  
16 has just said -- the website, what the lawyer has said to  
17 people -- and it doesn't change what motivated Mr. Gorton to go  
18 in the first instance.

19 They will get all of the inferences. They will try,  
20 they will build on it. We are just saying that he has this  
21 very preliminary beginning. He goes to this lawyer and then he  
22 ends up with a flip that has certain results, 48 percent for  
23 him, still fully exposed, 48 percent for his wife, and 2  
24 percent for each of his children. That's it.

25 They can cross-examine until the cows come home if

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1 they wish. They have tons of information, and they intend to  
2 put it on. It is just a question of whether he can respond  
3 with that one thing.

4 It is not to say that he has a good-faith belief in  
5 the legality of his conduct. We are not going to make that  
6 argument anywhere.

7 MR. POMERANTZ: Your Honor, I believe what they want  
8 to do is tell the jury half the story. This is exactly the  
9 Bilzerian and Pereira case. They want Mr. Gorton to be able to  
10 get on the stand and say, I did this only for estate planning  
11 purposes, and I did not do it to shield my assets.

12 But we know that there are privileged communications  
13 between him and Mr. Rubinstein which were directly related to  
14 creation of the FLPs that we are not being permitted to see or  
15 question the witnesses about.

16 The whole issue here is why did he create the FLPs and  
17 transfer his assets three days after the Grokster decision.  
18 They are trying to get into evidence half the story in a way  
19 that would deprive us then of effective cross-examination of  
20 that story because they're shielding it behind the privilege.

21 THE COURT: Just a moment.

22 How do you fit this case into Bilzerian factually?

23 MR. POMERANTZ: Your Honor, the factual overlap is  
24 that the state of mind of the defendant is what is at issue  
25 here. That is at the core of the fraudulent conveyance claim.

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1 At the core of the fraudulent conveyance claim is what was he  
2 thinking when he transferred the asset. When that thinking is  
3 substantially, to use the words of Pereira, when the legal  
4 advice plays a substantial and significant role in formulating  
5 the actions, you can't allow just half the story on state of  
6 mind, that is, the part that they want to disclose.

7 Here, because the key to a fraudulent conveyance claim  
8 is for us to be able to show that he took this action in order  
9 to hinder our ability to collect on a judgment in the future,  
10 therefore, front and center is state of mind and what he was  
11 thinking at the time. He wants to say I was acting in total  
12 good faith. I was doing it only for estate --

13 THE COURT: There are many statements he has made in  
14 the past that probably would have resulted in piercing the  
15 attorney-client privilege. But as I understand it, defense  
16 counsel have backed off making those statements and you plan to  
17 make much more modest statements. Is that right, Mr. Baio?

18 MR. BAIIO: Yes, it is, your Honor.

19 THE COURT: So I think some of your argument is  
20 arguing from the case that used to be and not the case that  
21 will be.

22 MR. POMERANTZ: No, your Honor. It was their choice  
23 whether to assert the privilege. It is their choice.

24 THE COURT: I know.

25 MR. POMERANTZ: Once they choose to assert the

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1 privilege, they cannot then try to use only the nonprivileged  
2 portion to show his state of mind on the very same subject  
3 which he got legal advice on. That's what Bilzerian is talking  
4 about.

5 THE COURT: I don't think you have gone far enough to  
6 fit it within Bilzerian. I will consider it further, but I  
7 don't think you have done that.

8 MR. POMERANTZ: Your Honor, I think the first time  
9 this is likely to come up, assuming it's not raised in opening,  
10 is when Mr. Gorton testifies. I would ask for the opportunity  
11 to have brief argument on this issue right before that so your  
12 Honor can see it in the context of the trial as it exists at  
13 that time.

14 THE COURT: All right. Where is he on the witness  
15 list?

16 MR. POMERANTZ: Several witnesses down. I don't know  
17 if it will be late this week or sometime next week. I am not  
18 sure.

19 THE COURT: OK.

20 MR. BAIO: The only issue I would have with that, your  
21 Honor, is in opening, if we are going to hear all about  
22 websites and intention and all of the other stuff and the  
23 timing, for example, of the thing, the closing being set three  
24 days after Grokster, I should be able to say that in fact that  
25 was set before Grokster came down. That is simply a fact.

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1 THE COURT: Some before, some after.

2 MR. BAIO: Pardon me?

3 THE COURT: Some before and some after.

4 MR. BAIO: The setting of the time, that is, when will  
5 this thing close, that was June 20.

6 THE COURT: Right.

7 MR. BAIO: The Grokster decision is the 27th. Unless  
8 they have some way of saying that they saw a crystal ball on  
9 the 20th, and maybe they do, they can make whatever argument  
10 they want, but as a matter of chronology that meeting was set  
11 before the Grokster decision came down. I am just talking  
12 about facts now. I don't know how much they will be putting in  
13 their opening.

14 But if they do, I would like to be able to have some  
15 understanding of what facts I can refer to. Right now I would  
16 assume that those facts are usable. If they say that he waited  
17 until after Grokster, three days after Grokster to move this  
18 money, it is actually not fully accurate, and that has nothing  
19 to do with privileged communications.

20 THE COURT: Which portion is not accurate?

21 MR. BAIO: That he did all of this three days after  
22 Grokster.

23 THE COURT: When you say "all of this," what do you  
24 mean?

25 MR. BAIO: He did this in reaction to Grokster.

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1 Because he had everything --

2 THE COURT: I would understand you if you would be  
3 more specific.

4 MR. BAIO: Yes, your Honor.

5 They are saying this he moved his assets three days  
6 after Grokster, and we believe the jury should understand that  
7 the timing of the signing was June 30 because that's when the  
8 financial data is available for the companies, and that was  
9 scheduled on June 20. So at the time it was scheduled for  
10 everybody to sign, when everybody could go, Grokster had not  
11 come down.

12 So to say that it was somehow the provocative event is  
13 inaccurate. At least I should be able to argue it in terms of  
14 the timing of the setting of the meeting.

15 THE COURT: I understand.

16 MR. BAIO: That is all, your Honor.

17 THE COURT: OK.

18 MR. POMERANTZ: Your Honor, all we were saying,  
19 because I do intend to talk about the transfer of the assets  
20 three days after Grokster in the opening.

21 The idea that they can sit there and say that his  
22 state of mind was that he was doing this only --

23 THE COURT: They are not using the word state of mind.  
24 You have to look at the words they're using and argue from  
25 that.

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1 MR. POMERANTZ: Your Honor, what they are saying --  
2 forget about the words state of mind. If they want to be able  
3 to argue to the jury that he was doing this only for estate  
4 planning purposes, then they had to produce the privileged  
5 documents because those documents would tell us whether he was  
6 only doing it for estate planning purposes or not.

7 THE COURT: I am not sure you have made a good enough  
8 case to pierce.

9 MR. POMERANTZ: I'm sorry?

10 THE COURT: I am not sure you have made a good enough  
11 case to pierce the attorney-client privilege.

12 MR. POMERANTZ: We don't want to pierce the  
13 attorney-client privilege. We want to hold them to the choice  
14 they made, which is to say, once they have asserted the  
15 privilege, then under Bilzerian and other cases they cannot  
16 offer evidence of the state of mind, because it is affected by  
17 the legal advice that they received that they are declining to  
18 turn over.

19 THE COURT: Now, in Bilzerian, as I understand it, the  
20 defendant was saying I thought that it was lawful for me to  
21 describe the source of my funds as "personal," which was  
22 asserting the good faith of the legality of the disclosure he  
23 made. You are saying this case fits squarely within that?

24 MR. POMERANTZ: The portion of your ruling which deals  
25 with the family limited partnerships, which is the only portion

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1 we are talking about, yes, we believe that fits squarely within  
2 that. What he's now saying is I thought I was doing this only  
3 for estate planning purposes, and therefore it was a legitimate  
4 transfer. That's exactly the same kind of situation where he's  
5 trying to justify the legality of the transfer by saying my  
6 state of mind was to transfer it only for estate planning  
7 purposes.

8 We believe that we will be able to show the primary  
9 purpose for transferring was to shield the assets from a  
10 potential judgment by the record companies, not for estate  
11 planning purposes.

12 THE COURT: I will give it more thought.

13 MR. POMERANTZ: Thank you, your Honor.

14 MR. BAIO: That is all we have today, your Honor.

15 THE COURT: OK. Good.

16 You will note on the voir dire that we have taken off  
17 some names. I think eMusic, iMesh, Rhapsody.

18 Is this an acceptable final questionnaire for the  
19 jury?

20 Perhaps we should move to the final song list.

21 MR. BAIO: Who would you like to hear from first on  
22 that, your Honor?

23 THE COURT: Let's see. I think I should hear from  
24 plaintiffs.

25 When did this distinction first come up, the



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1 unpublished?

2 MR. KLAUS: The unpublished versus the published  
3 distinction, your Honor?

4 THE COURT: Yes.

5 MR. KLAUS: I believe it is within the last week. I  
6 am not positive, but I believe it was within the last week.

7 THE COURT: OK.

8 MR. KLAUS: This is the issue that concerns  
9 approximately 30 of the works I think that are in dispute. I  
10 believe that, as to those, they were registered as unpublished  
11 works. I believe they were later registered as published  
12 works, although outside of the 90-day time period. And there's  
13 simply a legal disagreement between the defendants and between  
14 us as to whether or not that implicates Section 412.

15 THE COURT: All right.

16 MR. KLAUS: Just to be clear on the legal distinction,  
17 your Honor, 412 itself subsections (1) and (2) are phrased in  
18 the disjunctive.

19 THE COURT: Do you have the text of them attached to  
20 your May 2 letter. I'm sorry. Willkie Farr, do you have the  
21 text attached to your letter?

22 MR. BAIQ: Your Honor, Mary Eaton from my office will  
23 be handling this argument.

24 THE COURT: OK.

25 MS. EATON: Good afternoon, your Honor. I don't have

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1 the text of Section 412 attached to the letter, but if your  
2 Honor would like I do have a copy here for my own use that I am  
3 willing to share obviously.

4 THE COURT: That would be helpful. Thank you.

5 I will take a minute to read it.

6 OK. Sorry, Mr. Klaus. I'm ready.

7 MR. KLAUS: That's OK.

8 So the question is whether or not, if one has  
9 satisfied with respect to the same work -- although in  
10 Ms. Eaton's letter this morning there is some claim that maybe  
11 it's not the same work. They concede that for purposes of  
12 their argument they are going to accept that it's the same  
13 sound recording that once was unpublished and registered as  
14 such in an indisputably timely manner and then was later  
15 registered as a published work.

16 It is simply our position that if one has satisfied  
17 that registration requirement for the unpublished work under  
18 Section 412(1), then under your Honor's construction of Section  
19 412, where the purpose is to encourage prompt registration, the  
20 plaintiff has done enough.

21 You will remember in your March 29 opinion, your  
22 Honor, the entire basis for your construction of Section 412  
23 was to say that the statute is designed to encourage prompt  
24 registration. Therefore, when we have this circumstance that,  
25 insofar as anyone can tell, no Court has faced before about the

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1 application of Section 412 to someone who induces copyright  
2 infringement through a peer-to-peer service, we are going to  
3 place a premium on that question of encouraging prompt  
4 registration. But where that has been done, it doesn't seem to  
5 make sense to say that we're also going to hold you and tag you  
6 for being late under 412(2).

7 THE COURT: Can you tell me more simply what you are  
8 saying. I can try to rephrase it, but I know you will do it  
9 better.

10 MR. KLAUS: Our point, your Honor --

11 THE COURT: Yes.

12 MR. KLAUS: -- is that the works were registered as  
13 unpublished works within the timing of the statute under  
14 Section 412(1), and we think that's sufficient to make the  
15 works eligible for statutory damages.

16 THE COURT: Well, the statute seems to say there are  
17 two circumstances in which no award of statutory damages shall  
18 be made. One is in paragraph numbered (1) and one is in  
19 paragraphed numbered (2). Is there a factual scenario that  
20 mixes them up?

21 MR. KLAUS: I'm sorry, your Honor. I didn't follow  
22 you.

23 THE COURT: Does the same work fall within both  
24 subparagraphs?

25 MR. KLAUS: The same work falls within both

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1 subparagraph (1) and (2). You're correct.

2 THE COURT: I don't know the answer. What is your  
3 argument?

4 MR. KLAUS: Our argument, your Honor, going back, is  
5 that it's phrased in the disjunctive. That is number one.

6 The second argument, your Honor, is that the reason  
7 for the construction of Section 412 that has been given in this  
8 case, which is stated in your opinion and order, is that the  
9 purpose of the statute is to encourage copyright owners to  
10 register promptly. If that has been done with respect to an  
11 unpublished work, where the registration of it, it was  
12 registered as such, and thereafter the work is infringed  
13 through the system that the defendants used to induce  
14 infringement, then in these circumstances Section 412 should  
15 not be a bar to recovering statutory damages.

16 THE COURT: All right. And the defense? Responses?

17 MS. EATON: Good afternoon, your Honor.

18 There are actually two separate and distinct issues  
19 that are posed by plaintiffs' second amended final list of  
20 recordings, one of which is a relatively new issue, the one  
21 that we've just been addressing; the other of which is an old  
22 issue that we thought we had put behind us that we wanted to be  
23 sure to cover with your Honor today.

24 Let me begin with the relatively new issue that has  
25 arisen with respect to the appropriate interpretation of

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1 Section 412 of the Copyright Act.

2 As I understand plaintiff's position, and it is laid  
3 out in an e-mail exchange between Ms. LeMoine and I that took  
4 place on April 27 and April 28, just last week, which is  
5 Exhibit J to my letter of today to the Court, and in that  
6 exchange you will see what plaintiffs' position is. Our  
7 position is that the Copyright Act, Section 412, encourages  
8 prompt registration of all copyrights, and there are numerous  
9 cases on that point, including cases that have been cited by  
10 both sides to your Honor in prior briefing on Section 412, and  
11 indeed in this court's prior decisions with respect to that  
12 provision.

13 In either case, it was Congress' intent that the  
14 copyright holder should register early, and only if the  
15 copyright holder registers the work before it is infringed are  
16 they entitled to statutory damages.

17 The only difference between subsection (1) and  
18 subsection (2) is that subsection (1) applies to unpublished  
19 works whereas subsection (2) applies to published works.

20 There are scenarios in the case law, including in the  
21 Bouchat decision -- with which I'm sure the Court is familiar,  
22 we've discussed it many times before -- whereby the work in  
23 question was first infringed while in unpublished form, later  
24 registered, and the infringement continued.

25 This was the case of course about the logo for the

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1 Baltimore Ravens. In that case the Fourth Circuit held that  
2 there was no right to statutory damages because the  
3 infringement began preregistration, even though that  
4 infringement happened with respect to the unpublished work.

5 So the rule in the cases interpreting this statute is  
6 that no award of statutory damages shall be made in any case  
7 where the infringement commences prior to registration, and it  
8 makes no difference whether that occurs when the work is in  
9 published form or in unpublished form.

10 So it's our view that it remains plaintiffs' burden to  
11 show the timing of the infringement for each work on their list  
12 and to establish that that infringement happened through the  
13 LimeWire system before the work was registered. It doesn't  
14 matter whether it was registered in published form or, as we  
15 just learned last week, for some songs in unpublished form, the  
16 result is the same in either case.

17 I would point out for your Honor that this is not an  
18 issue that's limited to these 31 songs. It's a much bigger  
19 issue. According to our calculations, there are 9,561 songs  
20 for which the plaintiffs are seeking statutory damages. 4,497  
21 of those songs were published versions of those songs that were  
22 registered with the copyright office before the LimeWire system  
23 became available.

24 That means that there are 5,064 songs that were  
25 available and not registered in published form while the

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1 LimeWire system was available. Of that group of songs, we've  
2 already established that 1,302 of them were not timely  
3 registered within the meaning of subsection (2), that is to say  
4 they were published songs that were not registered within three  
5 months of the date of first publication.

6 If you crunch all of those numbers, you end up with  
7 3,762 songs that could have been infringed in unpublished form  
8 and prior to registration. It is our position that under  
9 subsection (1) of Section 412 of the Copyright Act that  
10 plaintiffs bear the burden, as this Court has already  
11 determined, of establishing that that infringement did not  
12 occur until postregistration. It is their burden to show that.

13 In that regard, your Honor, I would note that we  
14 sought information about just this sort of thing last August in  
15 interrogatories which we propounded regarding the date of first  
16 infringement for all of the works at issue whether they were in  
17 published or unpublished form and have never been supplied with  
18 that information.

19 So if it's plaintiff's intent to prove that those  
20 songs were in fact not infringed until postregistration, that  
21 information has never been supplied to us during the discovery  
22 period.

23 Which brings me back to the old issue, the 1,302  
24 songs. These are songs that were, as I say, not registered on  
25 time within the meaning of subsection (2), i.e., three months

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1 after the date of first publication.

2 Inexplicably those songs remain on plaintiffs' final  
3 list of sound recordings. Inexplicably there is an indication  
4 in plaintiffs' proposed final jury instructions that they  
5 intend to prove that they are entitled to statutory damages  
6 with respect to those works regardless.

7 It is our submission, your Honor, that the game is  
8 over with respect to those songs. There is no genuine dispute  
9 that the registrations were made late. You can determine that  
10 simply by looking at the registration certificates and  
11 comparing the date of first publication indicated thereon with  
12 the effective date of registration. It is a simple  
13 administrative matter that we did for plaintiffs.

14 There's no dispute that for those 1,302 works that  
15 they were outside of the three-month grace period. There is  
16 also no dispute, I would have thought, that the plaintiffs are  
17 unable to show that the infringement did not take place until  
18 registration.

19 Indeed Mr. Pomerantz on more than one occasion has  
20 represented both to this Court and to Judge Freeman that the  
21 plaintiffs do not know when the first date of infringement  
22 happened on the LimeWire system; that they were not in a  
23 position to know.

24 And, as it is their burden to make that showing, it is  
25 our submission that there's no longer any dispute, at least



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1 with respect to those 1302 works, and they should be stricken  
2 from plaintiffs' list and no mention made of them at the  
3 upcoming trial.

4 It is a trial on damages. These are works as to which  
5 they have no claim for damages, either statutory damages or, as  
6 your Honor has already held, actual damages. We have a lot to  
7 talk about. These songs is not one of those things.

8 THE COURT: Thank you very much.

9 MR. KLAUS: If I can briefly respond, which I can stay  
10 here for your Honor.

11 First, with respect to the smaller issue, it is, as  
12 Ms. Eaton was saying, the 30 works, the Bouchat case, the  
13 problem there was the works, she said well they were infringed  
14 at a time when they were unpublished. They were also  
15 unregistered. He didn't register them until much later.

16 The law that Ms. Eaton is relying on is the continuing  
17 series of infringing acts doctrine, which says if it starts at  
18 one point in time and it continues until later, it's just one.

19 I would just point out that in your Honor's opinion on  
20 the meaning of 412 in this case, in footnote 3 on page 7, you  
21 specifically said that you were not going to address the  
22 applicability of the continuing series of infringing acts  
23 doctrine. I confess math is not my strong suit, and I couldn't  
24 follow all of the numbers that Ms. Eaton had with respect to  
25 the works at issue in this case.

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1 THE COURT: Let me ask you to stop for a minute and  
2 compare notes on numbers.

3 MR. KLAUS: Sure.

4 Your Honor, I did compare, if now is an OK time to  
5 restart, I did compare numbers with Ms. Eaton.

6 I confess what I am baffled by is I thought on the  
7 Section 412 issue that they were raising an issue with respect  
8 to approximately 1,300 works where they said we have compared  
9 the date of the registration to the date of -- the dates that  
10 list of first publication, and we think there's more than 90  
11 days. So we therefore think the applicability of Section  
12 412(2) possibly applies.

13 I thought I heard Ms. Eaton say for the first time in  
14 the case, and she just told me again that what she believes is,  
15 with respect to the remaining 3,762 works that postdate the  
16 opening and operating of the LimeWire system, defendants are  
17 now taking the position that it is plaintiff's burden in the  
18 case to put on evidence of timely registration of those works.  
19 I think that's what she just said. I have never before heard  
20 that we were expected to bring witnesses in to attest to the  
21 registration certificates and to put 3,762 copyright  
22 registration certificates up on the board with the publication  
23 date.

24 (Continued on next page)

25

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1 THE COURT: What I have assumed all along is that you  
2 could each look at the same data and come up with lists of  
3 which falls within what category. If you haven't done so, it's  
4 time to do it now.

5 MR. KLAUS: That's exactly what we have done, your  
6 Honor, and I think we have this list of approximately 1,300  
7 words which have asterisks on them of being outside of 412.2.  
8 So, I don't think there is a jury instruction that says that we  
9 are required to come in and put on evidence of our being within  
10 Section 412.2.

11 So, that's what I --

12 THE COURT: Help me with the area of controversy.  
13 Ms. Eaton, what do you think is controverted here?

14 MS. EATON: I wouldn't have thought it was  
15 controverted but evidently it is. Our view is that it is  
16 plaintiff's burden to show compliance with Section 412 in order  
17 to be awarded statutory damages. What that means is that they  
18 must prove that there was no infringement prior to  
19 registration. At the outset we raised the 412 issue generally  
20 and by way of example said look at the certificate that they  
21 have produced to us. These certificates, on their face,  
22 demonstrate registration. That has no impact on whether they  
23 would be barred from seeking statutory damages under Section  
24 412.1, if what they just told me last Thursday is correct,  
25 i.e., that the published version and the unpublished version of

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1 the songs, in other words songs pre-release and post-release  
2 are identical works, and that those pre-release songs could be  
3 infringed through the Lime Wire system. Then it is their  
4 burden to show that they were not infringed until after they  
5 were registered.

6 Now, it could very well be that a great many of these  
7 songs were registered in unpublished form. I don't know that.  
8 I only received a handful of registrations for unpublished  
9 works late last week. It could very well be that one or more  
10 of the record labels never registered these unpublished songs,  
11 that they waited until they were released and then they  
12 registered them. But, your Honor, if it's true that they could  
13 have been, as Ms. LeMoine told me late last week, infringed in  
14 unpublished form, then the fact that they were registered in  
15 published form long after the fact does not give them a right  
16 to statutory damages.

17 And, I confess to you, I didn't realize that this was  
18 an issue until Ms. LeMoine raised the unpublished registrations  
19 as a justification for late registrations under Section 412.2.  
20 And after she told me that, I went back and looked through the  
21 record to see what the history of discussions on this issue was  
22 and discovered that, yes, indeed, the plaintiffs must have  
23 known that timeliness, in general, would be an issue in this  
24 case because they pled it in their complaint. You can look at  
25 paragraph 74, for example, of their complaint, which says

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1 they're seeking statutory damages for, quote unquote, timely  
2 registered works. It doesn't say timely registered published  
3 works only or timely registered unpublished works. It says  
4 timely registered works.

5 You can see that we looked -- it would be propounded  
6 in interrogatories, as I mentioned last August, saying tell us  
7 the date of infringement for the works that you say you are  
8 going to be suing on and their answer was: A, we don't have to  
9 provide you with that information; and B, we don't know that  
10 information in any event.

11 If that's true, then I fail to see how they can have a  
12 claim for statutory damages for these works. What they do have  
13 is a claim for actual damages, although that's a bridge that we  
14 have already crossed, as your Honor will remember.

15 So the dispute, to sum it up is, in essence, the  
16 burden is on them to show compliance with 412 either under  
17 412.2 for published work or under 412.1 for unpublished works.  
18 If they can't do that, those songs should be out of the case.

19 MR. KLAUS: This is a brand-new argument that  
20 Ms. Eaton has come up with within the last 24 hours, your  
21 Honor.

22 To be very clear, the Section 412.2 says with respect  
23 to published works, which are the overwhelming number of cases  
24 here, all except for the 30 that we have been describing, it is  
25 not the case -- she says it is our burden to show that there is

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1 no infringement before registration as to any of those works.  
2 That is wrong. Section 412.2, on its face, says no award of  
3 statutory damage for an infringement commenced after first  
4 publication and before the effective date of registration.  
5 This is the key proviso, your Honor: Unless the registration  
6 was made within three months of the first publication of the  
7 work.

8 They went through the list of 5,064 works that were  
9 published after Lime Wire came into existence where they  
10 thought they might have a 412 argument. They obviously  
11 compared the first publication date to the effective date of  
12 registration. What they found was that the exception of these  
13 1,300 works, they were all either timely or the registration  
14 was made within 90 days. And so, there is this subcategory of  
15 1,300 where we have a dispute as to the question of when they  
16 were first infringed through Lime Wire.

17 What your Honor resolved last week was a dispute in  
18 the jury instructions that with respect to those works, those  
19 works that are outside of that 90-day window, approximately  
20 1,300 of them, which of us bears the burden of proving that the  
21 works were not infringed through the Lime Wire system.

22 The reason we indicated those works with an asterisk,  
23 your Honor, is because that is an issue where the jury will  
24 hear evidence, they will hear your instruction on the burden of  
25 proof, and they will decide either that we have satisfied the

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1     burden that you have placed on us or we have not and they'll  
2     make their ruling.

3             But, I think that with respect --

4             THE COURT: I'm confused.

5             MR. KLAUS: Sure.

6             THE COURT: On the basis of what evidence will they  
7     make that particular determination?

8             MR. KLAUS: The evidence that we have, your Honor, is  
9     we have evidence of when we know the works were, to our  
10    knowledge the works were first infringed through Lime Wire. We  
11    have forensic -- we have forensic evidence of that and we  
12    don't --

13            THE COURT: That's contested?

14            MS. EATON: Well, I can tell you it is news to me,  
15    your Honor, and I can read you the quotes from Mr. Pomerantz in  
16    his letter to the Court of September of last year, the  
17    statements that he made at the November 1st hearing before  
18    Judge Freeman, and what they recently wrote to us, I believe it  
19    was on April 1st, respecting what evidence they had of the date  
20    of first infringement. I can read those quotes to you now,  
21    your Honor. We were told that they did not know and could not  
22    know when the date of first infringement was and therefore  
23    could not show that the infringements happened prior to  
24    registration.

25            MR. KLAUS: May I clarify what I said, your Honor?

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1 THE COURT: Yes.

2 MR. KLAUS: We have evidence of dates that we know the  
3 works were infringed. That's what we have physical evidence of  
4 of the date that we are certain that there was infringement.  
5 We are not certain and don't have information as to when,  
6 specifically, the works were infringed before that. We don't  
7 know that.

8 THE COURT: Before what?

9 MR. KLAUS: Before those dates as to which we do have  
10 certain knowledge.

11 THE COURT: And you have certain knowledge as to the  
12 dates for how many?

13 MR. KLAUS: I believe it is for, of the 1,300  
14 approximately they've placed in issue. I keep saying  
15 approximately, your Honor, because some number have been  
16 eliminated from the 1,300 list and it is actually a little  
17 closer to 1,200. But, as to those 1,200 or so, we do have  
18 evidence of dates that we know they were infringed. We don't  
19 know that those are the dates that they were not infringed. We  
20 have our witnesses, I would expect to say, that they don't know  
21 the dates that they would have been infringed before that and  
22 that will be the record. There will be record evidence about  
23 Lime Wire and how it operated and ultimately the jury will have  
24 to make a decision as to whether we have satisfied our burden  
25 of proof on that 412.2 issue.



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1 But, as of now, I think what Ms. Eaton was hoping or  
2 saying that she was expecting was that as a result of the  
3 ruling on the instruction as to which side had the burden of  
4 proof, that we would simply drop those works from the case.  
5 That's not something that we -- I frankly can't imagine  
6 standing before the Second Circuit and saying that because  
7 there was a ruling on a burden of proof question that we would  
8 have preserved our arguments as to those 1,200 to 1,300 works,  
9 your Honor.

10 So, think that there has been a ruling on the burden  
11 of proof. The evidence will come in at trial. If the evidence  
12 is as they say it is, that may be the way that the jury ruled.  
13 But, as of now, we just have a ruling as to which side has the  
14 burden of proof.

15 THE COURT: What, if anything, needs to be resolved  
16 pretrial?

17 MS. EATON: If they have further evidence respecting  
18 the date of first infringement, your Honor, they should produce  
19 it to us including by answering the interrogatories that were  
20 propounded approximately 10 months ago.

21 THE COURT: Are there any that you have not answered  
22 as to which you have answers?

23 MR. KLAUS: We have given them, your Honor, all of the  
24 evidence that we are going to rely on on this issue. They have  
25 all of the evidence that we are going to rely on on this issue.

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1 We are not going to come in as to one of these works and say,  
2 aha, here is a piece of evidence showing a prior date of  
3 infringement that we didn't give them.

4 THE COURT: All right. Thank you.

5 Yes?

6 MS. EATON: Very briefly, your Honor.

7 It would not be accurate to say that a dispute over  
8 the timing of the date of first infringement is a new issue.  
9 This is an issue that we have been discussing from the very  
10 beginning and there have been at least six or seven rounds of  
11 briefing on this section since at least our firm was involved.  
12 So, the notion that they should be surprised by this, I don't  
13 think, is a meritorious one.

14 In addition, to which I would point out that the  
15 plaintiffs seem to be trading Section 412 as if it was an  
16 affirmative defense, the burden of which rests on defendants to  
17 plead and prove. That is simply not the case. The burden is  
18 on the copyright holder to show compliance with 412 before any  
19 statutory damages can be awarded. And if they can't make their  
20 proof, they're not entitled to damages.

21 I don't want to test the Court's patience but one last  
22 thing and then I promise I will sit down. The notion that I  
23 addressed this in my letter that a subsequent, timely  
24 registration of a published work can somehow cure an existing  
25 infringement of an unpublished work is bizarre. Under

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1 plaintiff's scenario, one of their songs could be unpublished  
2 and infringed, as Ms. LeMoine told me herself last week. As  
3 such, it could be downloaded by, to use Mr. Pomerantz's phrase,  
4 bazillions of Lime Wire users. Subsequently, the label decides  
5 to register the song in released form. That registration is  
6 timely, it is done within three months of the date of first  
7 publication, i.e., release of the song. They want to claim  
8 that this history of substantial infringement of the unreleased  
9 version is somehow inconsequential and that they're entitled to  
10 statutory damages regardless. We don't think that that's a  
11 fair reading of the statute and we don't think that the case is  
12 supported.

13 THE COURT: Is there any case law, Mr. Klaus,  
14 supporting your interpretation of 412.1 and 2?

15 MR. KLAUS: Well, it is important to be clear, your  
16 Honor, because -- we need to be very clear that what --  
17 Ms. Eaton's new argument and I assure your Honor this argument  
18 we have briefed 412 more than any of us would probably care to.  
19 The Court has probably read more 412 briefing than the Court  
20 would ever care to. The first time we are hearing the argument  
21 that's being made now is today. What Ms. Eaton is saying is  
22 that 412.1 establishes a gotcha. It says that if you have a  
23 work that has been an unpublished work, then if there is any  
24 infringement of the work at any time that it was unpublished  
25 forever, you're forever after that point barred from recovering

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1 statutory damages.

2 THE COURT: Just a moment.

3 Subsection 1 speaks of before the effective date of  
4 its registration.

5 MR. KLAUS: Correct, its registration as an  
6 unpublished work. That's what 412.1 is concerned with, where a  
7 work is registered as an unpublished work and there is some  
8 number of works that do get registered as unpublished works.  
9 The 3,762 number that she gave you were registered as published  
10 works and if they are registered as published works then the  
11 timing rules of 412.2 applies.

12 THE COURT: Okay. If either of you have precedent  
13 telling me I should interpret it your way, let me know.

14 MR. KLAUS: Well, just to be clear, your Honor, we  
15 have given -- I just want to make sure what the precedent is  
16 that we are now supposed to be submitting to your Honor because  
17 there are at least three different issues that I think are now,  
18 have been lurking in the air. I just want to make sure we are  
19 clear on what they are.

20 THE COURT: Go ahead.

21 MR. KLAUS: Okay.

22 One is the burden of proof issue that we discussed  
23 which is as to those works that were untimely registered under  
24 412.2 where your Honor has said the plaintiffs have the burden  
25 of proving that the work was not infringed prior to

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1 registration, where that's been said, whether those works  
2 remain in the case and the burden of proof issue goes to the  
3 jury to decide whether we have satisfied it. That, I believe,  
4 covers something in the order of 1,223 works total. That's the  
5 number that had the little asterisk on the current schedule A.

6 The second issue is with respect to approximately 30  
7 works that were registered as unpublished works and were later  
8 registered as published works. As to those 30 works does the  
9 fact that they were registered as unpublished works mean that  
10 they can remain on our list?

11 What I'm calling the new argument, which is the 3,762  
12 argument which I understand Ms. Eaton to be making now for the  
13 first time which is that if a work was ever unpublished and it  
14 was ever infringed at a time that it was unpublished, then if  
15 the work is later registered as a published work, does the fact  
16 that it may have been infringed at some point when it was  
17 unpublished and unregistered, does that mean that that  
18 infringement triggered Section 412.1 and that work is  
19 ineligible for statutory damages; that third argument, your  
20 Honor, has never been raised in this case before. Never been  
21 raised in this case before today. This is the first time that  
22 it is being made. And if your Honor would like to hear, if  
23 your Honor would like us to submit precedent as to that third  
24 argument, we will do it. We simply think that that argument is  
25 wrong and it's untimely being made the day before trial starts.

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1 THE COURT: Well, the argument was raised among  
2 lawyers before today in e-mails.

3 MR. KLAUS: Yes. It was raised in e-mails but we  
4 should be very clear it was raised in e-mails with respect to  
5 what I have called now the second category of arguments  
6 concerning the 30 works. That's where Ms. Eaton says that she  
7 was having a late night e-mail exchange with Ms. LeMoine  
8 regarding these 30 works and I think what she, I believe said  
9 was -- I just want to -- and I don't have the e-mail in front  
10 of me but I think she said: Is it your position that if a work  
11 is subject to 412.1 and it was registered as an unpublished  
12 work, that you can still claim damages even if later on the  
13 same work was registered as a published work? And that's the  
14 critical point here, your Honor, is the effective date of  
15 registration in 412.1 as opposed to 412.2 is talking about its  
16 registration as an unpublished work. In 412.2 it's  
17 registration as an unpublished work, not from mixing and  
18 matching here, which is that there was an unpublished work at  
19 some point in time that may have been infringed. And it was  
20 later registered as a published work and if there was some act  
21 of infringement between those two dates then the statutory  
22 damages are barred.

23 THE COURT: I have asked you each to give me any  
24 authorities you have for your interpretations.

25 MR. KLAUS: Of course, your Honor.

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1 MS. EATON: Your Honor, I'm happy to do that. I would  
2 like to note that I did cite one such case in my letter to the  
3 Court already.

4 THE COURT: Okay.

5 MS. EATON: Which says, very simply, although the  
6 NFLP -- this is Bouchat case, 506 F.3d at --

7 THE COURT: I will read your letter.

8 MS. EATON: -- 330 holds: The NFLP violated the  
9 copyright for the first time in June 1996 when it first  
10 exhibited the flying V to the public in authorized Ravens  
11 merchandise. NFLP may have continued to violate the copyright  
12 law after July 25, 1996 when Bouchat registered. In using the  
13 word "commenced," Section 412.1 instructs us to trace NFLP's  
14 infringing conduct after registration back to NFLP's original  
15 infringement in 1996. The case is right on point. If the  
16 infringement occurs before registration, whether in published  
17 or in unpublished form, no statutory damages are available.

18 THE COURT: Would counsel like to raise anything else  
19 today?

20 MR. POMERANTZ: Yes, your Honor; a couple of smaller  
21 points.

22 I had asked defendant's counsel if they would agree  
23 not to mention the amount paid by Mr. Bildsen in settling the  
24 claims against him unless and until we call Mr. Bildsen as a  
25 witness because I think it is an irrelevant fact, unless and

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1 until we call him. And I thought they were going to agree to  
2 that but then when I talked to Mr. Baio today, he wasn't sure.

3 MR. BAIIO: I haven't heard whether the name Bildsen  
4 will come out of your mouth in your opening.

5 MR. POMERANTZ: It is not.

6 MR. BAIIO: Then I will not mention it in my opening.

7 MR. POMERANTZ: Thank you.

8 Second is I just wanted to confirm again another point  
9 based upon one of the slides that they sent to us, one of the  
10 demonstratives for the opening. We don't think it is  
11 appropriate or relevant and it is prejudicial.

12 MR. BAIIO: This may be a mistake. Are you talking  
13 about the last one?

14 MR. POMERANTZ: Yes.

15 MR. BAIIO: That was a mistake.

16 MR. POMERANTZ: Can I ask him one question, your  
17 Honor?

18 THE COURT: Sure.

19 (Counsel conferring)

20 MR. POMERANTZ: Your Honor, they are reserving the  
21 right to mention the compensation received by our witnesses or  
22 our employees including as part of their opening, and we think  
23 that is both irrelevant and highly prejudicial. It really has  
24 no relevance to this case and I don't see any need to do that  
25 and we would ask that that be precluded, from them using that



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1 during the opening.

2 MR. BAIO: Your Honor, I think the plaintiffs are  
3 going to say that people have lost their jobs as a result of  
4 what Lime Wire did. That's inappropriate because it is either  
5 damages or not. What they spend their damages on or the amount  
6 is just an ancillary repercussion claimed by them.

7 If they're going to talk about lost jobs then the jury  
8 should understand that the senior executives continue to get  
9 raises year after year in the face of those layoffs. I will  
10 not mention it if he doesn't go that route, but if he does, I  
11 would intend to blunt, what I believe, is the improper and  
12 inaccurate statements by showing what happened at senior  
13 executive levels.

14 THE COURT: Okay.

15 MR. BAIO: That's the only way.

16 THE COURT: Whose lost jobs are we talking about?

17 MR. POMERANTZ: Your Honor, the record companies are  
18 my clients, have lost thousands and thousands of jobs over the  
19 course of this past decade, and we do think that the total  
20 devastation that has been caused to this industry by  
21 peer-to-peer piracy, of which Lime Wire was the biggest for  
22 many years, is something that is important for the jury to  
23 understand as it is weighing all of the various factors that  
24 are relevant to statutory damages as well as the punitive  
25 damages.

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1 THE COURT: How does it relate to statutory?

2 MR. POMERANTZ: Well, when we sit there and talk about  
3 the harm to our company and the deterrence that is necessary  
4 here, when we talk about the conduct and attitude of Mr. Gorton  
5 and the people at Lime Wire, truly this is an industry, unlike  
6 any other industry out there, that has been devastated for a  
7 straight decade during the good times and the bad times of the  
8 last decade. And it's not just a matter of a financial  
9 statement, they want to make this like a financial statement  
10 like you got \$10 and now you have \$5, but it is more than just  
11 a financial statement, this is really something that is hurting  
12 real people.

13 THE COURT: Well, do you have any objection to  
14 Mr. Baio bringing in the compensation of executives if that has  
15 gone up at the same time that jobs were lost?

16 MR. POMERANTZ: Yes, I do object to that. And by the  
17 way, I do not know if it went up or went down, but the fact  
18 that there is various compensation structure from the top of  
19 the company to the person who receives the least isn't  
20 relevant, it is designed to sit there and say this individual  
21 is making a lot of money so therefore don't worry about the  
22 harm to the company. This isn't about -- on my end it is not  
23 about what a particular individual makes, it is the fact that  
24 my client's own copyrights, they have the right to have them  
25 copied in the way that they were copied through Lime Wire and

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1 if it caused massive harm to the copyright owner, not to an  
2 individual.

3 THE COURT: I'm not going to hear any more argument on  
4 that. I will let defense counsel bring in relevant economic  
5 arguments including compensation to executives.

6 MR. POMERANTZ: Thank you, your Honor.

7 THE COURT: Anything else?

8 MR. POMERANTZ: Yes, your Honor.

9 On the IRA. I think we each submitted some letters  
10 last Friday and I think your Honor was going to let us know how  
11 you wanted to handle the evidence regarding the IRA.

12 THE COURT: Right. I'm going to need to continue to  
13 review that. Is there any argument you wish to make in  
14 addition to what you have briefed?

15 MR. POMERANTZ: No, your Honor. Just in terms of the  
16 opening, I guess we shouldn't mention it unless your Honor has  
17 decided that we --

18 THE COURT: No, I don't think you should mention it in  
19 opening.

20 MR. POMERANTZ: The only other thing that I think it  
21 bears on -- well, it may not be the only thing -- is whether  
22 your Honor is contemplating that we will have -- that the only  
23 thing the jury will be asked at the end of Phase I is whether  
24 to award punitives or whether your Honor is contemplating that  
25 in Phase 1 the jury will be asked not only whether but, if so,

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1 how much. Because if that is the case, then we will need to  
2 decide the IRA issue before we argue the case to the jury and  
3 be able to put the evidence in if your Honor decides that it is  
4 relevant.

5 THE COURT: I understand. Before the jury charge you  
6 need to do that.

7 MR. POMERANTZ: And we have to put the evidence in.

8 THE COURT: Yes.

9 MR. POMERANTZ: So, it is really probably before  
10 Mr. Gorton testifies because that's where it would probably  
11 come into evidence.

12 THE COURT: All right. Well, if I haven't ruled on it  
13 before then, remind me.

14 MR. POMERANTZ: Thank you, your Honor.

15 THE COURT: Anything else?

16 MR. BAIO: No, your Honor.

17 THE COURT: Okay.

18 As I understand it, you will be attempting to meet  
19 this evening.

20 MR. POMERANTZ: Can we have a private conversation  
21 with your Honor after we conclude this hearing, your Honor?

22 THE COURT: Sure. If we are finished we can have that  
23 now. We are adjourned.

24 (Adjourned to 10:00 a.m., Tuesday, May 3, 2011.)  
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